Supreme Court, U.S.
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No. [illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CHEZ SEZ VIII, INC., t/a United Video, DAVID PORTEN, t/a Adult Entertainment Center, HAMILTON AMUSEMENT CENTER, INC., t/a Video Express, L.O.J., INC., t/a The Emporium, and VITO J. FRUGGIERO, INC., t/a Red Barn Books,

Petitioners,

vs.

DEBORAH T. PORITZ, Attorney General for the State of New Jersey, and THE STATE OF NEW JERSEY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a New Jersey criminal statute which outlaws booths or enclosures in sexually oriented businesses which "facilitate sexual activity," and has been judicially interpreted by the New Jersey Appellate Division to "embrace...all the physical requirements of other jurisdictions," leaving the configuration of such booths and lighting "to common sense and the informed discretion of a reasonable person," is unconstitutionally vague.

2. Whether the prohibition or regulation of only those booths or enclosures which are located in "sexually oriented businesses" renders the statute an unconstitutional content-based regulation of First Amendment speech.

PARENT AND SUBSIDIARY COMPANIES

Petitioners have no parent or subsidiary companies to be listed pursuant to Rule 29.6 of the Rules of this Court.

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OPINIONS AND ORDERS BELOW

On August 31, 1995, the Superior Court of New Jersey, Law Division-Mercer County, issued an Amended Opinion holding that New Jersey Statutes Annotated section 2C:33-12.2(b) was fatally vague and constituted an unconstitutional content-based violation of Petitioners' First Amendment right to free speech; enforcement of the statute was enjoined. That decision has not been reported, but is reproduced in the Appendix at pages A-22 to A-31, *infra*.

On February 7, 1997, the Superior Court of New Jersey, Appellate Division, issued an Opinion wherein it reversed the

Law Division, held that the statute was a valid content neutral regulation of free speech, and construed the statute in an attempt to rescue it from vagueness; the lower court's permanent injunction was vacated. The Opinion of the Appellate Division is reported at 297 N.J. Super. 33, 688 A.2d 119, and is reprinted in the Appendix at pages A-2 to A-21, *infra*.

On May 21, 1997, the Supreme Court of New Jersey filed an Order denying the petition for certification and dismissing the appeal. The Order is reprinted at page A-1, *infra*.

JURISDICTION OF THIS COURT

The Order of the Supreme Court of New Jersey denying the petition for certification of the judgment of the Appellate Division was filed on May 21, 1997 (A-1). Jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. §1257(a) and Rule 13.1 of the Rules of this Court, as a final judgment rendered by the highest court of New Jersey in which a decision could be had.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

New Jersey Statutes Annotated [hereinafter "N.J.S.A."] section 2C:33-12.1. Abating nuisance

a. In addition to the penalty imposed in case of conviction under N.J.S. 2C:33-12 or under section 2 of P.L.1995, c.167(C. 2C:33-12.2), the court may order the immediate abatement of the nuisance, and for that purpose may order the seizure and forfeiture or destruction of any chattels, liquors, obscene material or other personal property which may be found in such building or place, and which the court is satisfied from the evidence were possessed or used with a purpose of maintaining the nuisance. Any such forfeiture shall be in the name and to the use of the State of New Jersey, and the court shall direct the forfeited property to be sold at public sale, the proceeds to be paid to the treasurer of the county wherein conviction was had.

b. If the owner of any building or place is found guilty of maintaining a nuisance, the court may order that the building or place where the nuisance was maintained be closed and not used for a period not exceeding one year from the date of the conviction.

N.J.S.A. Section 2C:33-12.2. Sexually oriented businesses.

a. As used in this act:

(1) "Sexually oriented business" means:

(a) A commercial establishment which as one of its principal business purposes offers for sale, rental, or display any

of the following: Books, magazines, periodicals or other printed materials, or photographs, films, motion pictures, video cassettes, slides or other visual representations which depict or describe a "specified sexual activity" or "specified anatomical area" or still or motion picture machines, projectors or other image-producing devices which show images to one person per machine at any one time, and whether the images so displayed are characterized by the depiction of a "specified sexual activity" or "specified anatomical area"; or instruments, devices or paraphernalia which are designed for use in connection with a "specified sexual activity"; or

(b) A commercial establishment which regularly features live performances characterized by the exposure of a "specified anatomical area" or by a "specified sexual activity," or which regularly shows films, motion pictures, video cassettes, slides, or other photographic representations which depict or describe a "specified sexual activity" or "specified anatomical area";

(2) "Person" means an individual, proprietorship, partnership, corporation, association, or other legal entity.

(3) "Specified anatomical area" means:

(a) Less than completely and opaquely covered human genitals, pubic region, buttock or female breasts below a point immediately above the top of the areola; or

(b) Human male genitals in a discernibly turgid state, even if covered.

(4) "Specified sexual activity" means:

(a) The fondling or other erotic touching of covered or uncovered human genitals, pubic region, buttock or female breast; or

(b) Any actual or simulated act of human masturbation, sexual intercourse or deviate sexual intercourse.

b. In addition to any activities proscribed by the provisions of N.J.S. 2C:33-12, a person is guilty of maintaining a nuisance when the person owns or operates a sexually oriented business which offers for public use booths, screens, enclosures or other devices which facilitate sexual activity by patrons.

c. Notwithstanding any other provision of law, a municipality shall have the power to determine restrictions, if any, on the hours of operation of sexually oriented businesses.

d. A person who violates this act is guilty of a crime in the fourth degree.

STATEMENT OF THE CASE

This case involves the constitutionality of New Jersey Statutes Annotated section 2C:33-12.2(b), which prohibits "sexually oriented businesses" from offering "for public use booths, screens, enclosures or other devices which facilitate sexual activity by patrons." A violation of that section is a crime of the fourth degree (N.J.S.A. 2C:33-12.2(d)), and permits the closure of the business for up to one year (N.J.S.A. 2C:33-12.1(b)) and abatement of the nuisance through forfeiture of the property (N.J.S.A. 2C:33-12.1(a)) .

Prior to its scheduled effective date of September 3, 1995 (A-4), Petitioners, retail bookstores and video stores operating in the State of New Jersey (A-33 to A-35), filed suit challenging this statute as violative of their rights to freedom of speech and equal protection of the law as guaranteed by the First and Fourteenth Amendments to the United States Constitution, and related provisions of the New Jersey Constitution (complaint for declaratory and injunctive relief set forth in Appendix at pages A-32 to A-43). Petitioners challenged the statute as unconstitutionally vague and as an unconstitutional content-based regulation of free speech and a prior restraint in violation of the First and Fourteenth Amendments to the United States Constitution (A-39 and A-40).

The Superior Court of New Jersey, Law Division, preliminarily and permanently enjoined the State from enforcing the subject statute, holding that its plain meaning and legislative history indicate that it bans all booths in adult establishments and constitutes an unconstitutional content-based violation of Petitioners's First Amendment right to free speech (A-26 to A-28). The Court further held that even if the statute was not interpreted to totally ban booths, the phrase, "booths, which facilitate sexual activity" is unconstitutionally vague because ". . . a person of ordinary intelligence acting in good faith would necessarily have to guess as to what type of booths facilitate sexual activity and which do not (A-29)."

The Superior Court of New Jersey, Appellate Division [hereinafter "Appellate Division"], reversed the Law Division and construed the statute so as not to specify any precise physical requirements, but rather to embrace *all the requirements of other jurisdictions* (A-17). That Court wrote:

> . . . New Jersey's statute embraces all the physical requirements of other jurisdictions, and leaves it to each proprietor to design a viewing area which will not facilitate sexual activity.

(A-17). The Appellate Division then held that the statute was not unconstitutionally vague:

> . . . It adequately defines the proscribed conduct and instructs owners of commercial establishments not to facilitate such conduct on their premises by providing booths, enclosures or other devices not open to any public area. For example, booths which do not have apertures known as "glory holes" in their walls and are also open to public view would not be violative of the statute. The use and configuration of booths and enclosures, and their appropriate lighting is otherwise left by the Legislature to common sense and the informed discretion of a reasonable person.

(A-21).

The Appellate Division also held that this statutory enactment did not ban all booths, only those booths which facilitate sexual activity, and was a valid content-neutral regulation of constitutionally protected expression (A-16). The Law Division's permanent injunction against enforcement of the statute (A-3) was vacated (A-21).

The Supreme Court of New Jersey denied the petition for certification of the judgment (A-1).

REASONS FOR GRANTING CERTIORARI

POINT I

THE DECISION BELOW IS FATALLY VAGUE AND ALLOWS EACH INDIVIDUAL POLICE OFFICER AND PROSECUTOR TO DETERMINE WHAT TYPES OF BOOTHS ARE PROHIBITED AND OTHERWISE EXERCISE UNFETTERED DISCRETION

The heart of this case lies within the vigorous body of this Court's First Amendment jurisprudence unerringly demanding that in the First Amendment arena, "precision of regulation must be the touchstone in an area so closely touching our most precious freedoms," *United States v. Robel*, 389 U.S. 258, 265 (1967). This Court recently visited the First Amendment arena in *Reno v. American Civil Liberties Union*,

___U.S. ___, 117 S.Ct. 2329, 2344-45 (1997), reinforcing prior holdings that the chilling effect of a vague statute, and its deterrant effect on free speech, is increased in the face of a statute with criminal sanctions. The Court is presented here with its first opportunity to review a statute which greatly affects First Amendment expression and is defined by adopting the requirements of all other jurisdictions.

The Appellate Division's futile attempt to "narrowly" construe the amorphous phrase "facilitate sexual activity" in an attempt to save the statute from constitutional defects has backfired and introduced chaos into pre-existing confusion. To interpret a statute which so greatly impacts our cherished freedom of expression to "embrace all the physical requirements of other jurisdictions" (A-17), and leave the physical configuration and lighting of booths "to common sense and the informed discretion of a reasonable person" (A-21), is in direct conflict with this Court's mandate that persons of ordinary intelligence not be made to guess at the meaning of statutes -- especially those with penal sanctions, *see*; *Coates v. Cincinnati*, 402 U.S. 611, 612 (1971), and *Connolly v. General Construction Co.*, 269 U.S. 385, 391(1926).

In *United States v. Lanier*, ___U.S. ___, 117 S.Ct. 1219, 1225 (1997), this Court most recently reiterated that:

> [T]he vagueness doctrine bars enforcement of "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." (Citations omitted).

The Appellate Division was ill-advised in attempting to salvage such a blatantly vague statute at any cost. This Court expressly declined such an invitation in *Aptheker v. Secretary of State*, 378 U.S. 500, 515 (1964):

> The clarity and preciseness of the provision in question make it impossible to narrow its indiscriminately cast and overly broad scope without substantial rewriting. The situation here is different

> from that in cases such as *United States v. National Dairy Products Corp.*, 372 U.S. 29, 83 S.Ct. 594, 9 L.Ed. 2d 561, where the Court is called upon to consider the content of allegedly vague statutory language. Here, in contrast, an attempt to "construe" the statute and to probe its recesses for some core of constitutionality would inject an element of vagueness into the statute's scope and application; the plain words would thus become uncertain in meaning only if courts proceeded on a case-by-case basis to separate out constitutional areas of coverage. This course would not be proper, or desirable, in dealing with a section which so severely curtails personal liberty.

The Appellate Division's interpretation necessarily leaves Petitioners and law enforcement officials uncertain as to what configuration and lighting requirements must be adhered to, or whether almost any booth and lighting configuration is effectively banned as facilitating sexual activity. At its worst, this decision gives each law enforcement official in New Jersey the boundless discretion to act as a *de facto* legislator by establishing his or her own enforcement criteria, restricted only by their own definition of common sense and the informed discretion of a reasonable person, a standard that this Court has held to be unacceptable when expressive freedoms are at stake. *Smith v. Goguen*, 415 U.S. 566 (1974).

The direct and dire consequence of this vague statute is that law enforcement officials will have a smorgasbord of regulations and interpretations from which to choose when deciding which jurisdiction's regulations best suits their desired result. For example, some jurisdictions require that viewing booths be visible from a continuous main aisle or an aisle, *see, e.g., Wall Distributors, Inc. v. City of Newport News, VA*, 782 F.2d 1165 (4th Cir. 1986); *Postscript Enterprises v. City of Bridgeton*, 905 F.2d 223 (8th Cir. 1990); *Matney v. County of Kenosha*, 887 F.Supp. 1235 (E.D. Wis. 1995); *Libra Books, Inc. v. City of Milwaukee*, 818 F.Supp. 263 (E.D. Wis. 1993); *Movie & Video World, Inc. v. Board of County*

Commissioners of Palm Beach County, 723 F.Supp. 695 (S.D. Fla. 1989); *Suburban Video, Inc. v. City of Delafield*, 694 F.Supp. 585 (E.D. Wis. 1988), while other jurisdictions require that the viewing booths be visible from an adjacent public room, *Mitchell v. Commission on Adult Entertainment Establishments*, 10 F.3d 123 (3d Cir. 1993); *Berg v. Health & Hospital Corporation of Marion County, Indiana*, 865 F.2d 797 (7th Cir. 1989); *Doe v. City of Minneapolis*, 898 F.2d 612 (8th Cir. 1990). Still others require that the booths be visible from "common areas," *Grunberg v. Town of East Hartford, Connecticut*, 736 F.Supp. 430 (D. Conn. 1989), *aff'd*, 901 F.2d 297 (2d Cir. 1990); *Ellwest Stereo Theaters, Inc. v. Wenner*, 681 F.2d 1243 (9th Cir. 1982); *Broadway Books, Inc. v. Roberts*, 642 F.Supp. 486 (E.D. Tenn. 1986).

Significantly, in *Time Square Books, Inc. v. City of Rochester*, 223 A.D.2d 270, 645 N.Y.S.2d 951 (4th Dept. 1996), the New York Supreme Court, Appellate Division, in deciding to grant a preliminary injunction against enforcement of an open booth statute, found that less restrictive means, including the removal of the bottom two feet of the doors with solid walls and monitoring, were adequate under the New York State Constitution.

However, in *Mitchell*, F.3d at 143, the court appeared to reject some of those same configurations:

> . . . it does not appear that use of partial doors open only at the bottom, booths spaced further apart, or booths with the bottom two feet of the door removed would adequately accomplish the legislative goal of deterring promiscuous sexual contacts that can spread deadly disease.

Such vagaries will certainly please the law enforcement officer who seeks to use this statute as a tool to censor expression; it will stymie the owner of a business engaging in expression protected by the First Amendment who seeks to assure himself that he or she will not be held to be in violation of a criminal statute.

Similarly, law enforcement officials may choose from an abundant supply of differing lighting requirements, including: no lighting requirements (*see, e.g., Wall Distributors, Inc. v. City of Newport News, VA*, *supra*; *Postscript Enterprises v. City of Bridgeton*, *supra*; *Matney v. County of Kenosha*, *supra*; *Movie & Video World, Inc. v. Board of County Commissioners of Palm Beach County*, *supra*; *Broadway Books, Inc. v. Roberts*, *supra*); or that the booths be "well lighted" (*Grunberg v. Town of East Hartford, Connecticut*, *supra*); or that lighting be sufficient so that a person in a booth is visible from an adjacent public room, but not so bright as to prevent the viewing of motion pictures or other entertainment (*Mitchell v. Commission on Adult Entertainment Establishments*, *supra*; *Berg v. Health & Hospital Corporation of Marion County, Indiana*, *supra*; *Doe v. City of Minneapolis*, *supra*). Some regulations are so detailed as to require one foot-candle lighting in the booths (*see, e.g., T.K.'s Video, Inc. v. Denton County, Texas*, 24 F.3d 705, 710-711 (5th Cir. 1994); *Suburban Video, Inc. v. City of Delafield*, *supra*), while still others instead require ten foot-candle lighting in the public portion of the establishment, including the aisles (*Libra Books, Inc. v. City of Milwaukee*, *supra*). In fact, under the instant statute, a law enforcement officer is free to determine that *any* dimming of booth lights would facilitate sexual activity, or that certain arbitrary lighting requirements will be required, thus resulting in unbridled discretion being granted to law enforcement agents.

Indeed, the Appellate Division applied an incorrect standard of review with respect to the unconstitutional vagueness issue. Misconstruing this Court's ruling in *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489 (1982), the Appellate Division held that because the statute had not been challenged "as applied," it must be reviewed on its face to determine whether it is "impermissibly vague in all its applications." (A-19).

This Court actually ruled, however, that the standard cited by the Appellate Division is only applicable where "the enactment implicates no constitutionally protected conduct." *Id.*

at 494-495. Where the enactment affects a constitutionally protected right, however, the standard is much more stringent:

> ...perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply.

Id. at 499. The Court referenced, by footnote, *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972), and *Grayned v. City of Rockford*, 408 U.S. 104 (1972). In *Grayned v. City of Rockford*, this Court held:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them . . . . Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms" [internal citations omitted] . . . . Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked" [internal citations omitted].

Id. at 108-109.

In *NAACP v. Button*, 371 U.S. 415, 432-433 (1963), this Court further advised that:

> The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice

> to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.

This Court in *Reno*, again recently recognized that an unconstitutionally vague statute may, in fact, act as a prior restraint,

> The severity of sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images. *See, e.g., Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965).

Id. at --, 117 S.Ct. at 2345.

The instant statute abuts sensitive areas of basic First Amendment freedoms and falls squarely within the category of censorship which this Court sought to prohibit in *Grayned*, *supra*. Moreover, those concerns are magnified in the face of a criminal statute. *Reno v. American Civil Liberties Union*, 117 S.Ct. at 2344-45. Only the boldest business owner will have the temerity to wade into the murky waters which ill-define the boundaries of this statute, and attempt to divine the line between lawful and unlawful conduct. The penalties for a misstep include criminal sanctions and forfeitures.

The immediate consequence of this vague statute can be immediately and directly traced from the confused business owners who are presumptively engaged in expression which is protected under the First Amendment, to the police officer who is trying to distinguish among infinite booth configurations, and finally to the courts. All affected parties must attempt to decipher the parameters of the law by looking to regulations in jurisdictions throughout the country. Such a result simply cannot be tolerated in the First Amendment arena.

This Court has long protected the First Amendment from erosion through vague enactments. The Court is asked to do so again today.

POINT II

THE APPELLATE DIVISION APPLIED THE WRONG VAGUENESS STANDARD OF REVIEW TO THE CONSTITUTIONALITY OF STATUTES WHICH IMPACT FREEDOM OF EXPRESSION

The Appellate Division unquestionably applied the wrong vagueness standard of review to a statute that impacts rights which are protected by the First Amendment, thereby resulting in an erroneous ruling.

The Appellate Division cited to this Court's ruling in *Village of Hoffman Estates v. Flipside, Hoffman Estates*, and mistakenly held that because the statute had not been challenged "as applied," it must be reviewed on its face to determine whether it is "impermissibly vague in all its applications." (A-19). In *Village of Hoffman Estates*, this Court actually held that the standard cited by the Appellate Division is only applicable where "the enactment implicates no constitutionally protected conduct." *Id.* at 494-495. This Court made it crystal clear that when the enactment affects a constitutionally protected right, a much more stringent standard is to be applied: "if, for example, the law interferes with the right of free speech or association, a more stringent test should apply." *Id.* at 499. The Court specifically referred, by footnote, to *Papachristou v. City of Jacksonville*, and *Grayned v. City of Rockford.*

The Appellate Division's blatant misapplication of this Court's rulings has resulted in a vague, confused and simply incorrect ruling and standard of law. Absent review by this Court, the Appellate Court's misapplication of the law will have grave implications upon the exercise of constitutionally protected expression.

POINT III

THIS CASE IS THE FIRST TO ADDRESS THE VALIDITY OF A STATUTE THAT IS DEFINED BY THE REQUIREMENTS OF ALL OTHER UNIDENTIFIED JURISDICTIONS

Significantly, this case appears to be the first to raise before this Court the issue of whether a legislature can enact a law which affects expression protected by the First Amendment, but fails to define its parameters. Instead, as authoritatively construed by New Jersey's Appellate Division, the instant statute adopts all requirements of other jurisdictions without specification of which jurisdiction, what particular requirements, or how conflicts among the jurisdictions should be resolved (A-17). Apparently, under the instant statute, resolution as to which jurisdictions's requirements are controlling is left to each individual law enforcement official and the courts by applying "common sense" (A-21).

This statute places before this Court a question which is fundamental to the long history of its First Amendment jurisprudence: may a state or municipality regulate speech by adopting the amorphous myriad and often conflicting requirements of other jurisdictions, rather than a precisely defined statute? The implications of an affirmation of this statute are staggering. Each municipality throughout the nation will be free to enact ill-defined and vague statutes and, when challenged in court on constitutional grounds, simply point to an acceptable statute enacted by another jurisdiction and claim "that's what we meant."

Clearly, in the First Amendment arena, where "sensitive tools" are to be employed, *Speiser v. Randall*, 357 U.S. 513, 525, (1958), the consequences of this form of statute are disastrous.

POINT IV

REFUSAL TO GRANT CERTIORARI WILL BE TAKEN AS TACIT APPROVAL OF A STATUTORY SCHEME IN THE FIRST AMENDMENT ARENA WHICH PERMITS STATUTORY "BORROWING"

While a denial of certiorari cannot be deemed a decision on the merits, *United States v. Carver*, 260 U.S. 482, 490 (1923), it is often construed as approval of the decision below. *See, e.g.*, *Simmons v. Union News Co.*, 382 U.S. 884, 886 (1965) [Black, J. dissenting from denial of certiorari]. The repercussions of such a denial in this case would undermine, without any explanation, that body of First Amendment jurisprudence which this Court has so painstakingly crafted requiring precision of drafting any regulation where Free Speech is at stake.

Simply stated, this Court has demanded that any regulation of expression which is protected by the First Amendment be precise. *See*, *e.g.*, *United States v. Robel*, 389 U.S. 258, 265 (1967). If the instant statute is permitted to stand, then every other state legislature will feel free to pass statutes and regulations similarly affecting expression protected by the First Amendment, thereby granting to each individual law enforcement officer an invitation to determine the parameters of the censorship he or she wishes to exercise to reach their goals.

This Court has been unwavering in the recognition and acceptance of its burden of protecting the First Amendment with care and precision. Petitioners submit that a refusal to accept this case for review would be a similar derogation of duty when the ruling below stands as an affront to perhaps the most prized of our constitutional guarantees, the freedom of expression. While such right is not boundless, it is not to be prematurely and unduly stifled by laws such as these.

In sum, denial of certiorari by this Court would mean its tacit approval of a state statute -- not just a local municipal ordinance -- imposing criminal penalties in the First Amendment arena without standards to guide the conduct of business

operators or law enforcement officers. This would inevitably result in a chill of constitutionally protected expression.

POINT V

THE APPELLATE DIVISION INCORRECTLY DETERMINED THAT THE STATUTE CONSTITUTES A VALID CONTENT-NEUTRAL REGULATION OF FIRST AMENDMENT SPEECH.

The Appellate Division incorrectly determined that the instant statute is a valid content-neutral regulation of constitutionally protected speech, subject to review under the traditional "Time, Place and Manner" standard (A-16).

It has repeatedly been held that motion pictures are a recognized mode of expression. *See, e.g., Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *Jenkins v. Georgia*, 418 U.S. 153 (1974); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981). As such, even though the motion pictures may be indecent or sexually explicit, as long as they have not been found obscene, they are entitled to protection under the First Amendment. *Reno v. American Civil Liberties Union*,__U.S.__, 117 S.Ct. 2329, 2346 (1997); *Carey v. Population Services, Int'l.*, 431 U.S. 678, 701 (1977) [Non-obscene, offensive speech may not be suppressed].

It is also well-established that governmental regulations which burden speech based upon the content of the expression are presumptively invalid and may survive constitutional challenge only if they: (1) promote a compelling state interest; and (2) employ the least restrictive means to further the articulated interest. *See, Sable Communications of California, Inc. v. FCC.*, 492 U.S. 115, 126 (1989). This Court has specifically stated: "Our precedents . . . apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content. (Citations omitted)." *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994).

Determining whether a particular governmental regulation is content-based is often a difficult task. Ultimately, the government's purpose is the controlling consideration. *Ward v. Rock Against Rascism*, 491 U.S. 781, 791 (1989). However, the regulator's mere assertion of a content-neutral purpose will not be enough to save a statute which, on its face, discriminates based upon content of speech. *Turner Broadcasting*, 512 U.S. at 642; *Arkansas Writers' Project, Inc. v. Raggand*, 481 U.S. 221, 231-32 (1987).[1] Further, it is the State of New Jersey which must bear the burden of proving that these requirements have been met in order to justify burdening free speech. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986); *Phillips v. Burrough of Keyport*, 107 F.3d 164, 173 (3d Cir. 1997).

If the instant statute were truly content-neutral, it would be, as noted by the Law Division, applicable to booths or enclosures located upon any business establishment, rather than only those located at sexually oriented businesses (A-27).

Here, the principal reason for regulating plaintiffs' booths is the very nature of these businesses. The application of this legislation exclusively to sexually oriented businesses is the important distinction between the instant statute, and those relied upon by the Appellate Division and upheld in *Berg v. Health & Hospital Corp.*, 865 F.2d 797 (7th Cir. 1989), which applied to any business, and *Mitchell v. Commission on Adult Entertainment Establishments*, 10 F.3d 123 (3d Cir. 1993), which applied to any commercial building. Because the instant statute *only* regulates booths or enclosures located in sexually oriented businesses, it must deemed a content-based regulation.

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[1] Respondents may not assert that the important purpose of preventing the spread of sexually transmitted diseases prevents inquiry into the validity of their regulation. *See, Reno v. American Civil Liberties Union*,__U.S.__, 117 S. Ct. 2329, 2346 (1997) [Striking portions of statute aimed at protecting children from exposure to sexually explicit material].

This Court has recently articulated that where a statute is determined to be a content-based restriction on speech, it cannot properly be analyzed as a mere "form of time, place, and manner regulation." *Reno v. American Civil Liberties Union*, ___U.S. ___, 117 S.Ct. 2329, 2342 (1997). Such regulations are not entitled to the lesser intermediate level of scrutiny, *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

Further, even if the legislation at bar was content-neutral, it could not support a total ban on booths and enclosures, *Clark*, *supra*, because it would not embrace the least restrictive means available to advance the compelling state interest. *See*, *e.g.*, *Mitchell v. Commission on Adult Entertainment Establishments*, 10 F.3d 123, 144 (1993) ("the statute does not bar people from entertaining themselves by viewing sexually-explicit films within individual booths . . ."); *Bamon Corp. v. Dayton*, 923 F.2d 470, 474 (6th Cir. 1991) (ordinance "neither limits the number of viewing booths, nor attempts to regulate the materials shown in the booths"); *Berg v. Health & Hospital Corp. of Marion County, Indiana*, 865 F.2d 797, 803 (7th Cir. 1989) (ordinances did not ban people from watching films or entertainment in individual enclosures). Each state or municipality which has considered the regulation of viewing booths has apparently been able to address the purported governmental interest without totally destroying this protected mode of communication. Thus, regardless of whether the legislation be deemed content-neutral or content-specific, it cannot survive constitutional attack because it effects a total ban on booths.

Even assuming, *arguendo*, the validity of the Appellate Division's interpretation of the statute as embracing the requirements of all other jurisdictions (A-17), by leaving the decision of what physical requirements satisfy the statute in the hands of every individual law enforcement agent, the Appellate Division has effectively prohibited retailers from utilizing any configuration of booths or lighting for fear that they have not anticipated the interpretation which may be rendered

and enforced by a law enforcement officer. An officer may well decide that the existence of any wall or any manipulation of lighting evidences an intent to increase privacy within booths, thereby inherently facilitating sexual activity. Since that officer is free to scour the requirements of all other jurisdictions (A-17) to find language which supports his interpretation, he will most likely find some measure of support. *Smith v. People*, 361 U.S. 147 (1959).

Finally, even if the statute could be viewed as content neutral, the Appellate Division incorrectly held that it is narrowly tailored to serve a significant governmental interest, or that it leaves open ample alternative channels of communication (A-17,18).[2] A statute which bans booths or, in any event, fails to set forth the physical requirements of booths but rather embraces the physical requirements of other jurisdictions (A-17), simply cannot be characterized as "narrowly drawn". Similarly, such a statute does not provide ample alternative avenues of communication. Due to the vagueness of the statute and the Appellate Division's interpretation thereof, Petitioners simply cannot define what regulations are in effect under this statute, and how they may lawfully act without forfeiting their First Amendment rights.

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[2] Pursuant to the test set forth in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986), content-neutral regulations are valid if:

1. they are justified without reference to the content of the regulated speech;

2. they are narrowly tailored to serve a significant or substantial governmental interest; and

3. they leave open ample alternative channels of communications.

Mitchell v. Commission on Adult Entertainment Establishments, 10 F.3d 123, 130-131 (3d Cir. 1993).

CONCLUSION

To allow the State of New Jersey to use an inherently vague, content-based statute to regulate booths and enclosures in sexually oriented businesses, depending on the subjective "common sense" evaluation of retail store operators and law enforcement officers, would seriously hinder, if not obliterate, the viability of businesses presumptively protected by the First Amendment. For the reasons set forth herein, Petitioners respectfully request the Court to grant their petition for writ of certiorari.

Respectfully submitted,

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of Counsel

APPENDIX

Appendix A

SUPREME COURT OF NEW JERSEY
C-1033 September Term 1996
43,707

CHEZ SEZ, VIII., INC., et al.,

Plaintiffs-Petitioners,

v.

DEBORAH T. PORITZ, etc., et al.,

Defendants-Respondents.

ON PETITION FOR CERTIFICATION

FILED
MAY 21 1997
Stephen Townsend
CLERK

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-1729-95 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs; and it is further

ORDERED that the appeal filed in the within matter is dismissed pursuant to Rule 2:12-9.

WITNESS, the Honorable Alan B. Handler, Presiding Justice, at Trenton, this 20th day of May, 1997.

/s/ Stephen Townsend
CLERK OF THE SUPREME COURT

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

/s/ Stephen Townsend
CLERK OF THE SUPREME COURT
OF NEW JERSEY

Appendix B

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1729-95T3

CHEZ SEZ VIII, INC., t/a UNITED VIDEO, DAVID PORTEN, t/a ADULT ENTERTAINMENT CENTER, HAMILTON AMUSEMENT CENTER, INC., t/a VIDEO EXPRESS, L.O.J., INC., t/a THE EMPORIUM, and VITO J. FRUGGIERO, INC., t/a RED BARN BOOKS,

Plaintiffs-Respondents,

v.

DEBORAH PORITZ, Attorney General for the STATE OF NEW JERSEY, and the STATE OF NEW JERSEY,

Defendants-Appellants.

APPROVED FOR PUBLICATION

FEB 7 1997

APPELLATE DIVISION

Argued: January 6, 1997 - Decided: FEB 7 1997

Before Judges Petrella, Landau and Kimmelman.

On appeal from Superior Court of New Jersey, Law Division, Mercer County.

Carol Johnston, Deputy Attorney General, argued the cause for appellants (Peter Verniero, Attorney General, attorney; Joseph L. Yannotti, Assistant Attorney General, of counsel, Ms. Johnston, on the brief).

Paul J. Cambria, Jr., of the New York Bar, argued the cause for respondents (Steven S. Polinsky, of the New Jersey Bar, attorney and on the brief; Mr. Cambria, Jr., of the New York Bar, also on the brief).

The opinion of the court was delivered by

PETRELLA, P.J.A.D.

The State of New Jersey appeals from the Law Division's decision that *N.J.S.A.* 2C:33-12.2 was an unconstitutional, content-based restriction on free speech, as well as void for vagueness, and an order permanently enjoining its enforcement. We reverse.

Chez Sez VIII, Inc., t/a United Video, David Porten, t/a Adult Entertainment Center, Hamilton Amusement Center, Inc., t/a Video Express, L.O.J., Inc., t/a The Emporium, and Vito J. Fruggiero, Inc., t/a Red Barn Books (collectively referred to as plaintiffs) are retail book and video stores which sell and rent adult materials including video tapes, as well as provide private viewing booths for such materials. Plaintiffs obtained a judgment declaring *N.J.S.A.* 2C:33-12.2[1] violative of their First Amendment rights.

The challenge to the statute here concerns essentially the provisions relating to booths or enclosures. The Law Division Judge granted preliminary restraints[2] against enforcement of the subject statute because he considered it a content based restriction on free expression since it only applied to "sexually oriented business." Applying strict scrutiny, the judge concluded that although the statute promoted a significant government interest in reducing the spread of sexually

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[1] *N.J.S.A.* 2C:33-12.2(b) makes it a crime of the fourth degree for a person, who owns or operates a sexually oriented business, to offer booths which facilitate sexual activity. [*L.* 1995, *c.* 167, § 2 eff. Sept. 3, 1995].

[2] The State's motion for a stay was denied and a permanent injunction was issued on October 5, 1995.

transmitted diseases, it was not the least restrictive means of achieving that goal. Additionally, the judge was of the opinion the statute was void for vagueness because ordinary persons would not know which type of booth facilitated sexual activity.

On appeal the State essentially argues: (1) the statute is a content neutral regulation, designed to ameliorate secondary effects of sexually oriented businesses, and (2) the statute is understandable to persons of average intelligence. Alternatively, it argues that if the statute is found to be vague, we should construe it in such a manner as to allow it to stand and excise any constitutional defect.

Governor Whitman signed into law Senate Bill No. 342 of 1995 (S-342) which, among other things, prohibits in Section 2 (*N.J.S.A.* 2C:33-12.2) commercial establishments from providing booths or similar enclosures "which facilitate sexual activity." *P.L.* 1995, *c.* 167, eff. Sept. 3, 1995. Thus, *N.J.S.A.* 2C:33-12.2 provides:

> Sexually oriented businesses
>
> a. As used in this act;
>
> (1) "Sexually oriented business" means:
>
> (a) A commercial establishment which as one of its principal business purposes offers for sale, rental, or display any of the following:
>
> Books, magazines, periodicals or other printed material, or photographs, films, motion pictures, video cassettes, slides or other visual representations which depict or describe a "specified sexual activity" or "specified anatomical area"; or still or motion picture machines, projectors or other image-producing devices which show images to one person per machine at any one time, and whether the images so displayed are characterized by the depiction of a "specified sexual activity" or "specified anatomical area"; or instruments, devices, or

paraphernalia which are designed for use in connection with a "specified sexual activity"; or

(b) A commercial establishment which regularly features live performances characterized by the exposure of a "specified anatomical area" or by a "specified sexual activity," or which regularly shows films, motion pictures, video cassettes, slides, or other photographic representations which depict or describe a "specified sexual activity" or "specified anatomical area";

(2) "Person" means an individual, proprietorship, partnership, corporation, association, or other legal entity.

(3) "Specified anatomical area" means:

(a) Less than completely and opaquely covered human genitals, pubic region, buttock or female breasts below a point immediately above the top of the areola; or

(b) Human male genitals in a discernibly turgid state, even if covered.

(4) "Specified sexual activity" means:

(a) The fondling or other erotic touching of covered or uncovered human genitals, pubic region, buttock or female breasts; or

(b) Any actual or simulated act of human masturbation, sexual intercourse or deviate sexual intercourse.

> b. In addition to any activities proscribed by the provisions of *N.J.S.* 2C:33-12.2, *a person is guilty of maintaining a nuisance when the person owns or operates a sexually oriented business which offers for public use booths, screens, enclosures* or other devices *which facilitate sexual activity by patrons.*
>
> c. Notwithstanding any other provision of law, a municipality shall have the power to determine restrictions, if any, on the hours of operation of a [*sic*] sexually oriented businesses.
>
> d. A person who violates this act is guilty of a crime of the fourth degree. [Emphasis supplied].

Any establishment in violation of *N.J.S.A.* 2C:33-12.2 may be ordered closed for up to one year and is subject to forfeiture of property. *N.J.S.A.* 2C:33-12.1.[3]

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[3] *N.J.S.A.* 2C:33-12.1. Abating nuisance

> a. In addition to the penalty imposed in case of conviction under *N.J.S.* 2C:33-12 or under section 2 of P.L.1995, c.167 (C. 2C:33-12.2), the court may order the immediate abatement of the nuisance, and for that purpose may order the seizure and forfeiture or destruction of any chattels, liquors, obscene material or other personal property which may be found in such building or place, and which the court is satisfied from the evidence were possessed or used with purpose of maintaining the nuisance. Any such forfeiture shall be in the name and to the use of the State of New Jersey, and the court shall direct the forfeited property to be sold at public sale, the proceeds to be paid to the treasurer of the county wherein conviction was had.
>
> b. If the owner of any building or place is found guilty of maintaining a nuisance, the court may order that the building or place where the nuisance was maintained be closed and not used for a period not exceeding one year from the date of the conviction.

The statute was enacted to stem the spread of sexually transmitted diseases. The Senate Judiciary Committee in considering S-342 was made aware of the substantial public health interests of other states and the means they employed in regulating private enclosures provided by adult entertainment establishments. Essentially, those jurisdictions were concerned with unsanitary conditions and the spread of sexually transmitted diseases fostered by private enclosures in buildings of public accommodation.

Judicial inquiry is limited when reviewing legislative notice.[4] Here, the legislative action was informed by various considerations. The Senate Judiciary Committee considered a memorandum by the Chief of the Judiciary Section in the Office of Legislative Services outlining the concern that private booths provided by sexually oriented businesses encourage anonymous sexual activity and are conducive to the spread of sexually transmitted diseases. The Legislature was made aware that the Third Circuit recently upheld a Delaware statute regulating such private booths or enclosures in *Mitchell v. Comm'n on Adult Entertainment Est.*, 10 *F.*3d 123 (3rd Cir. 1993). Additionally a newspaper article in the *Atlantic City Press* was brought to the Committee's attention which described how New Jersey men often enter peep-show booths and gesture through an aperture known as a "glory hole" to an adjoining booth and engage in anonymous sexual acts. It was with this background that the Legislature enacted S-342.

I.

The distinctions between speech and conduct are often difficult to parse, but when conduct is regulated solely because

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[4] *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464, 469-470, 101 *S. Ct.* 1200, 1204-1205, 67 *L. Ed.* 2d 437, 443 (1981); *Palmer v. Thompson*, 403 *U.S.* 217, 224, 91 *S. Ct.* 1940, 1944, 29 *L. Ed.* 2d 438, 444 (1971); *Two Guys From Harrison, Inc. v. Furman*, 32 *N.J.* 199, 226 (1960); *New Jersey Turnpike Auth. v. Sissleman*, 106 *N.J. Super.* 358, 367 (App. Div.), *certif. denied*, 54 *N.J.* 565 (1969); and *Cleveland Area Bd. of Realtors v. City of Euclid*, 88 *F.*3d 382, 388 (6th Cir. 1996).

of its expressive attributes the Supreme Court has consistently held the regulation unconstitutional. *See e.g., United States v. Eichman*, 496 *U.S.* 310, 110 *S. Ct.* 2404, 110 *L. Ed.* 2d 287 (1990) (burning flag); *Tinker v. Des Moines Independent Community School Dist.*, 393 *U.S.* 503, 89 *S. Ct.* 733, 21 *L. Ed.* 2d 731 (1969) (wearing black arm bands); *Brown v. Louisiana*, 383 *U.S.* 131, 86 *S. Ct.* 719, 15 *L. Ed.* 2d 637 (1966) (participating in a sit-in); *Stromberg v. California*, 283 *U.S.* 359, 51 *S. Ct.* 532, 75 *L. Ed.* 1117 (1931) (flying a red flag). Thus, the First Amendment has been construed by various courts to protect sexually explicit expression of various types. *TK's Video, Inc. v. Denton County, Tex.*, 24 *F.*3d 705, 707 (5th Cir. 1994); *Mitchell v. Comm'n on Adult Entertainment Est.*, 10 *F.*3d 123, 130 (3rd Cir. 1993); *see e.g., Barnes v. Glen Theatre, Inc.*, 501 *U.S.* 560, 111 *S. Ct.* 2456, 115 *L. Ed.* 2d 504 (1991) (live nude dancing in adult book store and nightclub). While this form of expression is protected, the protection afforded it has been characterized as "only marginal[ ]." *Barnes v. Glen Theatre, Inc.*, *supra* (501 *U.S.* at 566, 111 *S. Ct.* at 2460, 115 *L. Ed.* 2d at 511). The Supreme Court in *Young v. American Mini Theatres*, 427 *U.S.* 50, 96 *S. Ct.* 2440, 49 *L. Ed.* 2d 310 (1976) recognized that "Specified Sexual Activities" may not be totally abrogated but its protection is "lesser [in] magnitude than the interest in untrammeled political debate." *Id.* at 70, 96 *S. Ct.* at 2452, 49 *L. Ed.* 2d at 326. Moreover, a State "may legitimately use the content of these materials as the basis for placing them in a different classification." *Id.* at 70-71, 96 *S. Ct.* at 2452, 49 *L. Ed.* 2d at 326.

A plain reading of *N.J.S.A.* 2C:33-12.2 makes clear that it does not purport to ban the viewing of sexually explicit material. Rather, it prohibits commercial establishments that offer sexually explicit material for distribution from providing "booths, screens, enclosures or other devices which facilitate sexual activity by patrons." *N.J.S.A.* 2C:33-12.2b. On its face the statute is intended to regulate sexual conduct as a health problem, not the materials presented.

In *Arcara v. Cloud Books, Inc.*, 478 *U.S.* 697, 106 *S. Ct.* 3172, 92 *L. Ed.* 2d 568 (1986), the Supreme Court granted *certiorari* to consider whether the First Amendment barred enforcement of a statute which authorized the closure of a business that promoted prostitution and lewdness. In *Arcara*, the defendant was an adult bookstore in New York which provided booths for private viewing of sexually explicit videos. A police officer observed instances of prostitution at the premises and reported that the owners appeared aware of the sexual activity. As a result, a complaint was filed to close the store pursuant to New York Public Health Law § 2329. New York Public Health Law § 2320 designated a premises as a public health nuisance when used or maintained for the purpose of lewdness or prostitution. Under § 2329, a building housing a public health nuisance could be closed for up to one year. In rejecting defendant's First Amendment argument, the Court "underscored the fallacy of seeking to use the First Amendment as a cloak for obviously unlawful public sexual conduct by the diaphanous device of attributing protected expressive attributes to that conduct." *Id.* at 705, 106 *S. Ct.* at 3176, 92 *L. Ed.* 2d at 577. The Court held that sexual activity was not absolutely protected and that First Amendment protection did not attach by "merely linking the words 'sex' and 'books.'" *Ibid.*

The Court in *Arcara* also rejected defendant's argument that the statutory effect of closing the store for one year impermissibly interfered with its protected right to sell books. *Id.* at 705-06, 106 *S. Ct.* at 3177, 92 *L. Ed.* 2d at 577. The Court noted that civil and criminal remedies may affect First Amendment protected activities, but the proscription here was less offensive because defendant could sell the materials at other locations absent the nuisance. *Id.* at 706, 106 *S. Ct.* at 3177, 92 *L. Ed.* 2d at 577.

When a statute favors one speaker over another, it is a form of content-based regulation. *Rosenberger v. Univ. of Virginia*, 515 *U.S.* ___, 115 *S. Ct.* 2510, 2516, 132 *L. Ed.* 2d 700, 715 (1995); *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 *U.S.* 789, 804, *S. Ct.* 2118, 2128, 80 *L. Ed.*

2d 772, 786 (1984). "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Univ. of Virginia*, *supra* (115 *S. Ct.* at 2516, 132 *L. Ed.* 2d at 715).

Under current jurisprudence, a statute aimed directly at the suppression of sexually explicit material is considered content-based and "presumptively violates the First Amendment." *Mitchell v. Comm'n Adult Entertainment Est.*, *supra* (10 *F.*3d at 130); *see R.A.V. v. City of St. Paul*, 505 *U.S.* 377, 382, 112 *S. Ct.* 2538, 2542, 120 *L. Ed.* 2d 305, 317 (1992); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 *U.S.* 105, 112 *S. Ct.* 501, 116 *L. Ed.* 2d 476 (1991). A content-based regulation is unconstitutional unless "necessary to serve a compelling state interest and ... narrowly drawn to achieve that end." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n.*, 460 *U.S.* 37, 45, 103 *S. Ct.* 948, 955, 74 *L. Ed.* 2d 794, 804 (1983); *see Carey v. Brown*, 447 *U.S.* 455, 461, 100 *S. Ct.* 2286, 2290, 65 *L. Ed.* 2d 263, 270 (1980).

The Law Division here was of the opinion that *N.J.S.A.* 2C:33-12.2 was a content-based regulation because "[t]he plain words of the statute limit its operation to 'sexually oriented businesses.'" The judge deduced that if the statute were content neutral it would apply to all businesses which facilitate anonymous sexual activity and not only those which distribute or make available adult material. Apparently, he believed that the statute was a form of viewpoint discrimination.

However, where the statute's overall purpose is aimed at the secondary effects of speech, it is considered content neutral and thus scrutinized under the traditional time, place and manner standard. *Mitchell v. Comm'n Adult Entertainment Est.*, *supra*, (10 *F.*3d at 130); *see Barnes v. Glen Theatre, Inc.*, *supra* (501 *U.S.* at 566, 111 *S. Ct.* at 2460, 155 *L. Ed.* 2d at 511-512); *Renton v. Playtime Theatres, Inc.*, *supra* (475 *U.S.* at 46-48, 106 *S. Ct.* at 928-929, 89 *L. Ed.* 2d at 37-38).

Content neutral statutes are "those that 'are justified without reference to the content of the regulated speech.'" *Renton v. Playtime Theatres, Inc.*, *supra* (475 *U.S.* at 48, 106 *S. Ct.* at 929, 89 *L. Ed.* 2d at 38) (quoting *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 *U.S.* 748, 771, 96 *S. Ct.* 1817, 1830, 48 *L. Ed.* 2d 346, 364 (1976)). "As long as a statute 'serves purposes unrelated to the content of expression,' it is content-neutral, 'even if it has an incidental effect upon some speakers or messages but not others.'" *Presbytery of N.J. of Orth. Pres. Church v. Florio*, 902 *F. Supp.* 492, 518 (D.N.J. 1995) (quoting *Ward v. Rock Against Racism*, 491 *U.S.* 781, 791, 109 *S. Ct.* 2746, 2754, 105 *L. Ed.* 2d 661, 675 (1989)).

Content neutral regulations are valid where "designed to serve a substantial government interest and do not unreasonably limit the alternative avenues of communication." *Renton v. Playtime Theatres, Inc.*, *supra* (475 *U.S.* at 47, 106 *S. Ct.* at 928, 89 *L. Ed.* 2d at 37); *see also Clark v. Community For Creative Non-Violence*, 468 *U.S.* 288, 293, 104 *S. Ct.* 3065, 3069, 82 *L. Ed.* 2d 221, 227 (1984); *Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 *U.S.* 640, 647-648, 101 *S. Ct.* 2559, 2563-2564, 69 *L. Ed.* 2d 298, 306 (1981); *Chesapeake B & M, Inc. v. Harford County, Md.*, 58 *F.*3d 1005, 1010 (4th Cir. 1995) ("The key inquiry is whether the regulations (1) are narrowly drawn to serve a substantial governmental interest and (2) allow for ample alternative avenues of communication.").

In *Mitchell v. Comm'n on Adult Entertainment Est.*, *supra* (10 *F.*3d at 130-131) the Third Circuit upheld a ban on private viewing booths in adult entertainment establishments. In applying *Renton*'s three part reasonable time, place, and manner test[5] the court said regulations of protected expression are valid if:

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[5] As the Third Circuit noted, "all federal courts that have addressed this issue have unanimously upheld the open-booth requirement as a valid exercise of state police power." *Mitchell v. Comm'n on Adult*

(Footnote continued)

> (1) they are justified without reference to the content of the regulated speech; (2) they are narrowly tailored to serve a significant or substantial government interest; and (3) they leave open ample alternative channels of communication.
>
> *Id.* at 130-131 (citing *Renton v. Playtime Theatres, Inc., supra* (475 *U.S.* at 47-48, 106 *S. Ct.* at 928-929, 89 *L. Ed.* 2d at 38) (other citations omitted)].

Delaware requires[6] that one side of a viewing booth be open to a public room as follows:

> No person shall own, operate, manage, rent, lease or exercise control over any commercial building, structure, premises or portion or part thereof, which contains:
>
> (1) *Partitions* between subdivisions of a room, portion or part of a building, structure or premises

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Entertainment Est., supra (10 *F.3d* at 142); *see e.g., Bamon Corp. v. City of Dayton*, 923 *F.*2d 470 (6th Cir. 1991); *Doe v. City of Minneapolis*, 898 *F.*2d 612 (8th Cir. 1990); *Postscript Enter. v. City of Bridgeton*, 905 *F.*2d 223 (8th Cir. 1990); *Berg v. Health & Hospital Corp.*, 865 *F.*2d 797 (7th Cir. 1989); *FW/PBS, Inc. v. City of Dallas*, 837 *F.*2d 1298 (5th Cir. 1988), *vacated in part on other grounds*, 493 *U.S.* 215, 110 *S. Ct.* 596, 107 *L. Ed.* 2d 603 (1990); *Wall Distrib., Inc. v. City of Newport News*, 782 *F.*2d 1165 (4th Cir. 19986); *Ellwest Stereo Theatres, Inc. v. Wenner*, 681 *F.*2d 1243 (9th Cir. 1982); *Grunberg v. Town of East Hartford, Conn.*, 736 *F. Supp.* 430 (D. Conn. 1989), *aff'd*, 901 *F.*2d 297 (2d Cir. 1990); *Suburban Video, Inc. v. City of Delafield*, 694 *F. Supp.* 585 (E.D. Wis. 1988); *Broadway Books, Inc. v. Roberts*, 642 *F. Supp.* 486 (E.D. Tenn. 1986).

[6] Delaware's statute applies to "adult entertainment establishment," defined as:

> any commercial establishment, business or service, or portion thereof, which offers sexually oriented material, devices, paraphernalia or specific sexual activities, services, performance of any combination thereof, or in any other form, whether printed, filmed, recorded or live . . . .
>
> [*Del. Code Ann.* tit. 24, § 1602(2) (1992)].

> having an aperture which is *designed or constructed to facilitate sexual activity* between persons on either side of the partition; or
>
> (2) *Booths, stalls, or partitioned portions* of a room or individual rooms, used for the viewing of motion pictures or other forms of entertainment, having doors, curtains or portal partitions, *unless such booths, stalls, partitioned portions of a room or individual rooms so used shall have at least one side open to an adjacent public room so that the area inside is visible to persons in adjacent public rooms.* Such areas shall be lighted in a manner that the persons in the areas used for viewing motion pictures or other forms of entertainment are visible from the adjacent public rooms, but such lighting shall not be of such intensity as to prevent the viewing of the motion pictures or other offered entertainment. [*Del. Code Ann.* tit. 24, § 1633(b) (1992) (emphasis supplied)].

Delaware's statute was held content neutral because it did not ban adult materials, but only regulated the place where such materials could be viewed. *Mitchell v. Comm'n on Adult Entertainment Est., supra* (10 *F.*3d at 140). It did not regulate the content of materials viewed, but was aimed at the incidental effects which result from the use of closed booths, such as the spread of AIDS and other communicable diseases that are the potential product of unprotected sex. The Third Circuit held that the government had a substantial interest in reducing or eliminating private booths which facilitate such sexual activity. *Ibid.*

Delaware's statute expressly stated that it was intended to "eliminate the possibility of the spread of, or infection by, communicable diseases." *Del. Code Ann.* tit. 24, § 1631(a) (1992). The statute's legislative histroy reflected the Delaware Senate's concern about "anonymous sex," noting that such activity often took place at adult entertainment establishments and posed a threat to public health, and that private booths

were "'little more than masturbation booths' ... [where] seminal fluid was commonly found dripping down the walls and on the floor in puddles." *Mitchell v. Comm'n on Adult Entertainment Est.*, *supra* (10 *F.*3d at 142). The Delaware statute was designed to inhibit the spread of sexually related diseases. *Ibid.*

In determining whether the legislative decision was reasonably arrived at, the Third Circuit acknowledged the Legislature's capacity to take "legislative notice," analogous to judicial notice, of other jurisdictions' substantial need for regulation. *Id.* at 136, 142; *see Wall Distrib., Inc. v. City of Newport News*, 782 *F.*2d 1165, 1169 n. 7 (4th Cir. 1986) (adopting theory of "legislative notice" allowing legislatures to take notice of matters of common knowledge); *Postscript Enter. v. City of Bridgeton*, 905 *F.*2d 223 (8th Cir. 1990) (upholding legislation which restricted adult movie arcade's operations based upon *Wall Distrib.* theory of legislative notice). Therefore, the Third Circuit concluded that the Delaware Legislature's decision to ban private booths was not "a mere unsupported legislative preference for open booths or because the legislature arbitrarily and irrationally believed that closed booths contribute to a serious health problem." *Mitchell*, *supra* (10 *F.*3d at 143).

Likewise the record supports the New Jersey Legislature's decision to ban booths which facilitate sexual activity in sexually oriented businesses. The Legislature was aware of the dangers to public health, particularly the current concern regarding the spread of AIDS, that such anonymous sexual encounters present, and the measures that other jurisdictions have taken in an attempt to minimize these dangers. *Cf. Behringer Est. v. Princeton Med. Ctr.*, 249 *N.J. Super.* 597, 630-631 (Law Div. 1991) (explaining the transmittal and dangers of Human Immunodeficiency Virus and Acquired Immunodeficiency Syndrome [AIDS]). More particularly, the Legislature was cognizant of the fact that private booths which facilitate sexual activity by patrons are conducive to the spread of sexually transmitted diseases. Accordingly, the Law Division Judge correctly recognized that New Jersey has a

substantial interest in eliminating such booths that lead to "generally unhygienic condition[s]" and transmittal of communicable diseases. The Legislature could take notice of what has occurred in other states and could act on that information without waiting for the collection of similar information in this State from the operation of establishments catering to sexually oriented business. This was a reasonable, if not prudent, exercise of legislative power.

The second prong of the *Renton* analysis requires us to consider whether the enacted regulation is narrowly tailored to the government's significant interest in public health. *See Renton v. Playtime Theatres, Inc.*, *supra* (475 *U.S.* at 52, 106 *S. Ct.* at 931, 89 *L. Ed.* 2d at 41). In general, where a statute affects speech, as opposed to activity, the means chosen to achieve the government's interest cannot be substantially broader than necessary. *Ward v. Rock Against Racism*, *supra* (491 *U.S.* at 796-800, 109 *S. Ct.* at 2757-2758, 105 *L. Ed.* 2d at 678-680). A content neutral regulation is not tested under the "least restrictive means" standard, but rather the restriction is considered "narrowly tailored 'so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Mitchell v. Comm'n on Adult Entertainment Est.*, *supra* (10 *F.*3d at 137) (citing *Ward v. Rock Against Racism*, *supra* (491 *U.S.* at 799, 109 *S. Ct.* at 2758, 105 *L. Ed.* 2d at 680) (quoting *United States v. Albertini*, 472 *U.S.* 675, 689, 105 *S. Ct.* 2897, 2906, 86 *L. Ed.* 2d 536, 548 (1985))). "[T]he regulation 'need not be the least-restrictive or least-intrusive means of doing so,'" *Mitchell v. Comm'n on Adult Entertainment Est.*, *supra* (10 *F.*3d at 143) (citing *Ward v. Rock Against Racism*, *supra* (491 *U.S.* at 798, 109 *S. Ct.* at 2757-2758, 105 *L. Ed.* 2d at 680) (footnote omitted)), and "will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Ward v. Rock Against Racism*, *supra* (491 *U.S.* at 800, 109 S. *Ct.* at 2758, 105 *L. Ed.* 2d at 680).

Mitchell rejected the bookstore's argument that there were better means to achieve the government's interest in

preventing the spread of sexually transmitted disease, noting that while there may be many options available to a Legislature, it was not the proper function of the judiciary to substitute its judgment for that of the Legislature. *Mitchell v. Comm'n on Adult Entertainment Est.*, *supra* (10 *F.*3d at 143). The State "did not have to show that '[t]he open booth regulation appears to be the least burdensome means of controlling offensive and illegal activity within the booths that can be imagined.' " *Id.* at 144 (quoting *Wall Distrib., Inc. v. City of Newport News*, *supra* (782 *F.*2d at 1170)). The regulation was held not offensive to First Amendment protection because adult materials may still be viewed. *Id.*

In the case at bar, the Law Division Judge applied strict scrutiny and found the statute was not the "least restrictive means" to address the problem, construing it to be a complete ban on all booths. In so doing, the judge misinterpreted the statute. As we construe the statute[7] on its face, only booths or areas screened or enclosed so as to preclude visibility from public areas facilitate sexual activity and are prohibited on premises occupied by sexually oriented businesses. Given this construction, the statute does not ban booths which do not facilitate sexual activity. The appropriate standard to determine tailoring is under the content neutral time, place and manner analysis, *i.e.*, whether a substantial government interest would be "achieved less effectively absent the regulation." *Ward v. Rock Against Racism*, *supra* (491 *U.S.* at 799, 109 *S. Ct.* at 2758, 105 *L. Ed.* 2d at 680) (quoting *United States v. Albertini*, *supra* (472 *U.S.* at 689, 105 *S. Ct.* at 2906, 86 *L. Ed.* 2d at 548)).

New Jersey's Legislature was presented with a substantial, if not compelling problem - the spread of sexually transmitted

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[7] Courts are obligated to narrowly construe a statute to save it from any constitutional defect. *State v. Mortimer*, 135 *N.J.* 517, 533-534, *cert. denied*, ___ *U.S.*___, 115 *S. Ct.* 440, 130 *L. Ed.* 2d 351 (1994); *Town Tobacconist v. Kimmelman*, 94 *N.J.* 85, 104 (1983); *New Jersey State Chamber of Commerce v. New Jersey Election Law Enforcement Comm'n*, 82 *N.J.* 57, 75 (1980).

disease through anonymous sexual activity occurring in adult bookstores' private booths. To resolve this public health concern, the Legislature prohibited commercial adult entertainment establishments from providing "booths, screens, enclosures or other devices which facilitate sexual activity by patrons." *N.J.S.A.* 2C:33-12.2b. Other jurisdictions place specific physical restrictions on the types of booths permitted, in effect requiring the inside of the booth to be visible from public areas of the establishment. *See e.g., Mitchell v. Comm'n on Adult Entertainment Est., supra* (10 *F.*3d at 142) (open on one side to a public room); *Bamon Corp. v. City of Dayton*, 923 *F.*2d 470 (6th Cir. 1991) (removal of doors); *Doe v. City of Minneapolis*, 898 *F.*2d 612 (8th Cir. 1990) (open on one side); *Berg v. Health & Hospital Corp.*, 865 *F.*2d 797 (7th Cir. 1989) (open on one side to a public room); *Wall Distrib., Inc. v. City of Newport News, supra* (782 *F.*2d 1165) (visible from continuous aisle); *Suburban Video, Inc. v. City of Delafield*, 694 *F. Supp.* 585 (E.D. Wis. 1988) (removal of doors). The rationale behind such requirements is that visibility deters sexual activity.

New Jersey's statute, while not specifying physical requirements, accomplishes the same result. As we construe the Act, enclosures meeting other jurisdictions' physical requirements would be permissible under the State's statute. For example, if the interior of a booth is visible to a public room it would not be considered conducive to sexual activity any more than other areas of the business that are open to the public and visible to visitors, customers and store personnel. Thus, New Jersey's statute embraces all the physical requirements of other jurisdictions, and leaves it to each proprietor to design a viewing area which will not facilitate sexual activity.

The final prong the *Renton* analysis is whether there are reasonable alternative channels of communication available for the restricted form of "speech." *See Renton v. Playtime Theatres, Inc., supra* (475 *U.S.* at 53, 106 *S. Ct.* at 932, 89 *L. Ed.* at 41). "[A] restriction on expressive activity may be invalid if the remaining modes of communication are inadequate." *Members of City Council v. Taxpayers for Vincent*,

supra (466 *U.S.* at 812, 104 *S. Ct.* at 2132, 80 *L. Ed.* 2d at 791). It is not enough that there be alternative modes of communication, those modes must be practical. *New Jersey Citizen Action v. Edison Tp.*, 797 *F.*2d 1250, 1261 (3d Cir. 1986).

In holding that the Delaware ban on private viewing booths permitted ample alternative channels of communication, *Mitchell v. Comm'n on Adult Entertainment Est.*, *supra* (10 *F.*3d at 144) noted that "[n]othing in [the Delaware Act] limits the number of viewing booths or the type of material that can be shown within the booths." Nor did the statute preclude rental or purchase of such material.

With respect to this aspect, we consider "whether those methods not prohibited by the challenged regulation (viewing the films, etc., with an open door) are equivalent to the prohibited methods (viewing the films, etc., behind a closed door)." *Berg v. Health & Hospital Corp.*, *supra* (865 *F.*2d at 803). *Berg* upheld legislation which required booths to be open on one side because it did not limit the available materials and did not prohibit people from watching films in individual enclosures. The "viewing public" was not "'denied access to the market or ... unable to satisfy its appetite for sexually explicit fare.'" *Ibid.* (quoting *Young v. American Mini Theatres*, *supra* (427 *U.S.* at 62, 96 *S. Ct.* at 2448, 49 *L. Ed.* 2d at 321)).

N.J.S.A. 2C:33-12.2 likewise leaves ample alternative modes for viewing adult materials. They may still be purchased or rented. In addition, nothing in the statute prohibits the use of coin-operated vending machines to view these materials, even in booths, so long as these booths do not facilitate sexual activity. Hence, the statute does not deny access to these materials.

III.

Plaintiffs contend that the statute must be more exacting because it is a penal law which intrudes upon free expression. *See State v. Cameron*, 100 *N.J.* 586, 592 (1985) ("The scrutiny to be accorded legislation that trenches upon first

amendment liberties must be especially scrupulous."); *see also Town Tobacconist v. Kimmelman*, 94 *N.J.* 85, 119 n. 16 (1983). The owners of sexually oriented businesses also argued that *N.J.S.A.* 2C:33-12.2 was unconstitutionally vague because it does not define what type of enclosure facilitates sexual activity.

The vagueness doctrine is premised on the notion that the law must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 *U.S.* 104, 108, 92 *S. Ct.* 2294, 2298, 33 *L. Ed.* 2d 222, 227 (1972); *see also Town Tobacconist v. Kimmelman*, *supra* (94 *N.J.* at 118) ("Vague laws deprive citizens of adequate notice of proscribed conduct, and fail to provide officials with guidelines sufficient to prevent arbitrary and erratic enforcement."). Statutes are void if their "prohibitions are not clearly defined." *Grayned v. City of Rockford*, *supra* (408 *U.S.* at 108, 92 *S. Ct.* at 2298, 33 *L. Ed.* 2d at 227). Statutes need not be meticulous in specificity, but should be afforded "flexibility and reasonable breadth," *id.* at 110, 92 *S. Ct.* at 2300, 33 *L. Ed.* 2d at 227, given the nature of the problem and wide range of human conduct. *See Smith v. Goguen*, 415 *U.S.* 566, 581, 94, *S. Ct.* 1242, 1251 39 *L. Ed.* 2d 605, 616 (1974).

In determining vagueness, a common sense approach is appropriate in construing the enactment, *see SDJ, Inc. v. City of Houston*, 837 *F.*2d 1268, 1278 (5th Cir. 1988), in terms of the persons who may be subject to it, *Town Tobacconist v. Kimmelman*, *supra* (94 *N.J.* at 118-120), and in context with its intended purpose. *State v. Cameron*, *supra* (100 *N.J.* at 591). Since the challenge here to *N.J.S.A.* 2C:33-12.2 is not as applied, the statute must be reviewed on its face to determine if it is "impermissibly vague in all its applications." *Id.* at 593 (*quoting Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 *U.S.* 489, 102 *S. Ct.* 1186, 1192, 71 *L. Ed.* 2d 362, 369 (1982)).

Central Ave. Enterprises, Inc. v. City of Las Cruces, 845 *F. Supp.* 1499 (D.N.M. 1994), held a penal statute impermissibly

vague in relation to adult entertainment. There the district court held the Las Cruces ordinance void for vagueness because it failed to define "sexual activity" or "specified anatomical areas." *Id.* at 1503-1504. When terms are defined, however, a vagueness argument generally fails. *See e.g., Young v. American Mini Theatres, supra* (427 *U.S.* at 60-62; 96 *S. Ct.* at 2447-2448, 49 *L. Ed.* 2d at 320-321); *Berg v. Health & Hospital Corp., supra* (865 *F.*2d at 803). *See also State v. Lee*, 96 *N.J.* 156, 166 (1984). Here, *N.J.S.A.* 2C:33-12.2 clearly defines specified sexual activity.

In addition, *N.J.S.A.* 2C:33-12.2a(4) contains the verb "facilitate," which has uniformly been found not to offend the vagueness doctrine. *See e.g., Matter of Kaster*, 454 *N.W.*2d 876 (Iowa 1990) (reasoning that proscribed criminal activity was clearly defined and "facilitate" in the context of a forfeiture statute was not vague); *People v. Chastain*, 733 *F.*2d 1206, 1209 (Colo. 1987) (recognizing broad definition of proscribed tools which facilitate burglary reflected Legislature's understanding that "a burglar's choice of tool is limited only by his imagination and ingenuity"); *State v. Bush*, 636 *F.*2d 849, 852 (Mont. 1981) (facilitate is common word giving fair warning of prohibited conduct).

In holding the open booth ordinance in *Berg v. Health & Hospital Corp.* not vague and that people of common intelligence could identify which establishments were subject to the ordinance, the Seventh Circuit reasoned:

> the ordinance and its regulations *plainly are directed at those establishments which provide individual booths where high-risk sexual activity may occur and to businesses that offer as part of their business the entertainment to be viewed within the enclosure*. And, although the term "entertainment" is arguably general, when read in the particular context of this ordinance, it cannot be said that it is beyond the grasp of persons of ordinary intelligence.

[*Berg v. Health & Hospital Corp.*, *supra* (865 *F.*2d at 803) (citations omitted)].

New Jersey's statute is not vague. It adequately defines the proscribed conduct and instructs owners of commercial establishments not to facilitate such conduct on their premises by providing booths, enclosures or other devices not open to any public area. For example, booths which do not have apertures known as "glory holes" in their walls and are also open to public view would not be violative of the statute. The use and configuration of booths and enclosures, and their appropriate lighting is otherwise left by the Legislature to common sense and the informed discretion of a reasonable person. Through simple supervision, owners can monitor and detect the activities of their patrons.

The order declaring *N.J.S.A.* 2C:33-12 unconstitutional is reversed. The restraints imposed against enforcement thereof are vacated.

I hereby certify that the
foregoing is a true copy of the
original on file in my office

/s/ Emille Cox

Appendix C

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION — MERCER COUNTY
DOCKET NO. L-95-3349

Civil Action
AMENDED OPINION

CHEZ SEZ VIII, INC., t/a United Video, DAVID PORTEN, t/a Adult Entertainment Center, HAMILTON AMUSEMENT CENTER, INC., t/a Video Express, L.O.J., INC., t/a The Emporium, and VITO J. FRUGGIERO, INC., t/a Red Barn Books,

Plaintiffs,

v.

DEBORAH T. PORITZ, ATTORNEY GENERAL FOR THE STATE OF NEW JERSEY and THE STATE OF NEW JERSEY

Defendants.

Decided: August 31, 1995

Paul J. Cambria, Jr., of the New York Bar, for plaintiffs (Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, LLP and John J. D'Anton, attorneys).

Janine L. Long, Deputy Attorney General, for defendant. (Deborah T. Poritz, Attorney General of New Jersey, attorney; Ms. Long, on the brief).

CARCHMAN, A.J.S.C.

This matter comes before the court on order to show cause by plaintiffs, which are retail bookstores and video stores which offer for sale and rental a variety of adult materials and videotapes as well as provide video-viewing booths for the screening of such materials. Plaintiffs have filed a declaratory

judgment action to have both *N.J.S.A.* 2C:33-12.1 as amended and new section *N.J.S.A.* 2C:33-12.2 declared unconstitutional. In the interim, plaintiffs seek preliminary injunctive relief to prevent defendants from enforcing the statutes pending further determination by the court.

N.J.S.A. 2C:33-12.2 provides that a person is guilty of a crime of the fourth degree if one "owns or operates a sexually oriented business which offers for public use booths, screens, enclosures or other devices which facilitate sexual activity by patrons." The statute defines "sexually oriented business" as "a commercial establishment which as one of its principal business purposes offers for sale, rental or display. . . [b]ooks, magazines, periodicals or other printed material, or photographs, films, motion pictures, video cassettes, slides or other visual representations which depict or describe a "specified sexual activity" or "specified anatomical area". . . ."

The statute further defines "specified sexual activity" as the "fondling or other erotic touching of covered or uncovered human genitals, pubic region, buttock or female breast" or any "actual or simulated act of human masturbation, sexual intercourse or deviate sexual intercourse." "Specified anatomical area" includes "[l]ess than completely and opaquely covered human genitals, pubic region, buttock or female breasts below a point immediately above the top of the areola" or "human male genitals in a discernibly turgid state, even if covered."

N.J.S.A. 2C:33-12.2 also grants municipalities "the power to determine restrictions, if any, on the hours of operation of a sexually oriented business." The amendment to *N.J.S.A.* 2C:33-12.1 authorizes a court to order the immediate abatement of the nuisance created by one found guilty of violating *N.J.S.A.* 2C:33-12.2. To effect that end, the court is empowered to order the seizure and forfeiture or destruction of items on the property which "were possessed or used with a purpose of maintaining the nuisance." The court is also empowered to order the closing of any building which is the subject of an *N.J.S.A.* 2C:33-12.2 violation for up to one year. Both the

amendments to *N.J.S.A.* 2C:33-12.1 and new section *N.J.S.A.* 2C:33-12.2 were enacted on July 6, 1995 and are to become effective on September 4, 1995.

Crowe v. De Gioia, 90 *N.J.* 126 (1982), sets forth the considerations which courts must utilize in deciding whether to grant an injunction. A plaintiff seeking injunctive relief must demonstrate (a) that the injunction is necessary to prevent irreparable harm, (b) that plaintiff has a reasonable probability of success on the merits, (c) that the harm to plaintiff without the injunction would be greater than the harm done to other parties in interest as a result of the issuance of the injunction; and (d) that the legal right underlying the plaintiff's claim is not unsettled. *Id.* at 132-34. The parties have concentrated in their written submissions and rightly so, on the issue of "reasonable probability of success on the merits." The court examines that prong of the Crowe factors first.

There are two discrete sections of *N.J.S.A.* 2C:33-12.2. Neither is dependent on the other for enforcement or effectiveness and each entails a separate analysis under the *Crowe* factors. The court first analyzes the hours of operation provision.

This provision grants municipalities the power to set restrictions on the hours of operation of sexually oriented businesses. Regulations which are imposed for the purpose of restraining speech based on its content, presumptively violate the First Amendment. *City of Renton v. Playtime Theatres*, 475 *U.S.* 41, 46-47, 106 *S. Ct.* 925, 928, 89 *L. Ed.* 2d 29, 37 (1986) (citing *Carey v. Brown*, 447 *U.S.* 455, 462-63 n.7, 100 *S. Ct.* 2286, 2291 n.7, 65 *L. Ed.* 2d 263, 270-71 n.7 (1980)). Nevertheless, it is equally clear that "if the regulation's predominate purpose is the amelioration of socially adverse secondary effects of speech-related activity, the regulation is content neutral and the court must measure it against the traditional content-neutral time, place, and manner standard." *Mitchell v. Commission on Adult Entertainment Establishments*, 10 *F.*3d 123, 130 (3d Cir. 1993) (citing *Barnes v. Glen Theatre, Inc.*, 501 *U.S.* 560, 566, 111 *S. Ct.* 2456, 2460, 115

L. Ed. 2d 504, 511 (1991); *Renton*, *supra*, 475 *U.S.* at 46-48, 106 *S. Ct.* at 928-29, 89 *L. Ed.* 2d at 36-38; *Young v. American Mini Theatres*, 427 *U.S.* 50, 70-72, 96 *S. Ct.* 2440, 2452-53, 49 *L. Ed.* 2d 310, 326-27 (1976)).

Under *Renton*, time, place and manner restrictions are valid if "(1) they are justified without reference to the content of the regulated speech; (2) they are narrowly tailored to serve a significant or substantial governmental interest; and (3) they leave open ample alternative channels of communication." *Mitchell*, *supra*, 10 *F.*3d at 130 (citing *Renton*, *supra*, 475 *U.S.* at 47-48, 106 *S. Ct.* at 928-29, 89 *L. Ed.* 2d at 37-38). This court is currently unable to assess plaintiff's probability of success on the merits of its claim for injunctive relief on the hours of operation provision because no municipality has yet acted to restrict the hours of operation of sexually oriented business. Accordingly, this issue is not yet ripe for judicial determination.

If and when a municipality does act under the power granted it by *N.J.S.A.* 2C:33-12.2(c), the restrictions then imposed may be assessed under the tests imposed by the reasonable time, place and manner line of cases. Until that time, this court will not speculate as to what type of hour restrictions would or would not pass constitutional muster. Some hours of operation restrictions clearly will comport with the constitution. For example, in *Mitchell*, the Third Circuit upheld a Delaware law against constitutional attack which limited the operating hours of all adult entertainment establishments in the state to 10 A.M. to 10 P.M. Monday through Saturday, excluding legal holidays. *See also Star Satellite, Inc. v. Biloxi*, 779 *F.*2d 1074, 1077 (5th Cir. 1986) (upholding city ordinance which limited adult bookstores to the hours of 10:00 A.M. to 12:00 midnight, Mondays through Saturdays). In *Mitchell*, the Third Circuit found that the Delaware statute was content-neutral, advanced a substantial governmental interest, was sufficiently narrowly-tailored and left open adequate alternative channels of communication. New Jersey municipalities may, with a proper factual basis, enact similar restrictions on the hours of operation of sexually oriented

businesses which comport with the federal constitution. Nevertheless, this court expresses no view as to whether such restrictions, analyzed independently under the New Jersey Constitution, would be valid. The issue of whether or not to issue an injunction as to the hours of operation portion of *N.J.S.A.* 2C:33-12.2 is not yet ripe for determination. No injunction as to that subsection will issue at this time.

The court now turns to that section of the statute which makes owning or operating "a sexually oriented business which offers for public use booths, screens, enclosures or other devices which facilitate sexual activity by patrons" a crime of the fourth degree. As mentioned above, if the regulation of sexually explicit materials is aimed at the suppression of First Amendment rights, it is content-based and presumptively violates the First Amendment. *See Mitchell, supra*, 10 *F.*3d at 130 (citing *Renton, supra*, 475 *U.S.* at 46-48, 106 *S. Ct.* at 928-29, 89 *L. Ed.* 2d at 36-38). Regulations which are presumptively invalid in that manner only survive constitutional review if they promote a compelling state interest and employ the least restrictive means to further that articulated interest. *See Sable Communications, Inc. v. FCC*, 492 *U.S.* 115, 126, 109 *S. Ct.* 2829, 2836, 106 *L. Ed.* 2d 93, 105 (1989).

The court finds that *N.J.S.A.* 2C:33-12.2(b) is, in fact, content-based. The plain words of the statute limit its operation to "sexually oriented businesses." This is a crucial distinction between this statute and other so-called "open-booth" statutes which have been upheld in other jurisdictions.

The evil which the State is legislating against, as revealed by the committee reports on the bill, is "conduct . . . conducive to the spread of sexually transmitted diseases." This conduct, specifically, as revealed in materials submitted to the Senate Judiciary Committee, is that in which customers of video stores with enclosed video booths either masturbate, defecate or have sexual relations with individuals in adjoining booths through apertures, or "glory holes," in the side walls of the booths. Such conduct, apparently undertaken with

anonymous partners, with whom there is little or no discussion, and mainly engaged in without the use of condoms, may certainly lead to the transmission of any variety of sexually transmitted diseases. The glaring problem with the statute is that it is aimed only at sexually oriented businesses. However, it is abundantly clear that the evil sought to be eliminated is the anonymous, unprotected sexual contact. If the statute were truly content-neutral, it would apply to any business establishment in which there were "booths, screens, enclosures or other devices." Sexual contact undertaken in this context poses a threat to the public health regardless of what type of film is being screened in the booth or what other items are available on the premises for sale or rental. Nevertheless, the legislature has only legislated against booths in sexually oriented businesses. This is a clear example of a statute which is content-based.

It was the sweeping applicability of the county ordinance at issue in *Berg v. Health & Hospital Corp.*, 865 *F.*2d 797 (7th Cir. 1989) (applicable to any "business operated on the premises which offers as part of its business the entertainment to be viewed within the enclosure") and the state statute in *Mitchell*, *supra* (applicable to "any commercial building . . . which contains . . . [p]artitions between subdivisions of a room, portion or part of a building . . . having an aperture . . . designed . . . to facilitate sexual activity") which rendered them content-neutral. Those statutes made no distinction between types of films or entertainment, applying equally to a showing of "Rebecca of Sunnybrook Farm" as to adult features. *See Mitchell*, *supra*, 10 *F.*3d at 140; *Berg*, *supra*, 865 *F.*2d at 802. This statute, by contrast, would not apply to booths in a facility exhibiting only "Rebecca of Sunnybrook Farm" but would apply in a facility which offered adult material for sale, rental, or even merely display as one of its principal business purposes. The danger posed to the public by the two types of activity would be identical, yet this statute would deem criminal the operation of only the latter, based solely upon the content of its wares. This is the antithesis of content-neutrality.

The court must now determine whether or not there is a compelling governmental interest at stake. The court finds that the interest involved is, indeed, compelling. As identified in the committee report, the legislature sought to curb the spread of sexually transmitted diseases. Evidence was before the legislature which revealed the type of activity taking place in these booths both in New Jersey and in other locales, along with the generally unhygienic condition in which many of the booths were maintained. The legislature may properly consider not only the direct evidence of what was transpiring in New Jersey but may also "rely on the experiences of other communities." *See Berg*, *supra*, 865 *F.*2d at 803.

One of the most significant, if not the most significant, sexually transmitted diseases is Acquired Immune Deficiency Syndrome (AIDS), which is irreversible, uniformly fatal and which has no known cure. Halting the spread of this and other communicable diseases by reducing the incidence of promiscuous, unprotected sex undoubtedly constitutes a compelling state interest.

Notwithstanding these interests, the "booth" section of this statute fails to pass muster under the "least restrictive means" portion of the constitutional analysis, however. The plain words of the statute make the operation of a sexually oriented business which contains booths a criminal offense. This total ban on the existence of video booths is, in no way, the least restrictive means available to advance the state interest implicated in this matter. Other jurisdictions have repeatedly shown the ability to regulate and restrict the operation of video booths in a manner consonant with constitutional freedoms. *See, e.g.*, *Mitchell*, *supra*; *Bamon Corp. v. Dayton*, 923 *F.*2d 470 (6th Cir. 1991); *Doe v. City of Minneapolis*, 898 *F.*2d 612 (8th Cir. 1990); *Wall Distributors, Inc. v. City of Newport News*, 782 *F.2d* 1165 (4th Cir. 1986); *Movie & Video World v. Board of County Comm'rs*, 723 *F. Supp.* 695 (S.D. Fla. 1989); *Suburban Video, Inc. v. City of Delafield*, 694 *F. Supp.* 585 (E.D. Wis. 1988). The statutory enactment before the court fails to do so. The statute, as passed, does not merely restrict access to video booths, it eliminates it. This

result is constitutionally impermissible and stands in stark contrast to the reasons given for the constitutionality of other statutes. *See Mitchell*, *supra*, 10 *F.*3d at 141. (The "amendment affects only the manner in which an expressive performance is viewed, not its substance."); *Berg*, *supra*, 865 *F.*2d at 803 ("The ordinance does not bar people from watching films or entertainment in individual enclosures.").

The State asserts that the statute at issue does not ban video booths per se, but only those "which facilitate sexual activity." This argument, while appearing to be at odds with the plain meaning of the construction of the statute as well as its legislative history, even if accepted, merely extricates the statute from one constitutional pitfall only to have it land in another.

N.J.S.A. 2C:33-12.2(b) is unconstitutionally vague. The vagueness doctrine "'is essentially a procedural due process concept grounded in notions of fair play.'" *State v. Lee*, 96 *N.J.* 156, 165 (1984) (quoting *State v. Lashinsky*, 81 *N.J.* 1, 17 (1979)). It requires that a penal statute "give fair notice of conduct that is forbidden." *Id.* at 166. This statute fails to do so. The statute either forbids "booths, which facilitate sexual activity," which is constitutionally infirm as mentioned above, or, deleting the comma, "booths which facilitate sexual activity."

Even if the court were to accept the latter interpretation, as urged by the State, a person of ordinary intelligence acting in good faith would necessarily have to guess as to what type of booths facilitate sexual activity and which do not. This uncertainty is impermissible in a penal statute.

Other jurisdictions, when confronted with substantially similar concerns about the spread of disease through the use of video booths, clearly and constitutionally prescribed what type of booths would comport with the law. *See Mitchell*, *supra* (booths need be open on one side); *Bamon Corp.*, *supra* (booths must be "visible from a well-illuminated main aisle," "not be obscured by any curtain, door or other enclosure," "be without holes or openings," "not be occupied by more than

one person," and be illuminated by at least a 25-watt light bulb); *Berg*, *supra* (booths must have "at least one side open to an adjacent public room"); *Wall Distributors*, *supra* (booths, among other things, must be "visible from a continuous main aisle"). The New Jersey legislature has not provided any guidance to one trying to decipher what the difference would be between a booth which facilitates sexual activity and one which does not.

If the legislature is of the view that an open side to the video booths prevent them from facilitating sexual activity, as many other jurisdictions do, it should say so. Operators of premises which have video booths would then be able to conduct themselves in accordance with the statute. As it currently stands, one must speculate as to whether or not his conduct is proscribed. That is constitutionally impermissible. *See Lee*, *supra*, 96 *N.J.* at 166. This statute similarly provides so little guidance and definition to law enforcement officials that enforcement of this law could not be other than arbitrary. This is also repugnant to the constitution. *See Kolender v. Lawson*, 461 *U.S.* 352, 358, 103 *S. Ct.* 1855, 1858, 75 *L. Ed.* 2d 903, 909 (1983) (citing *Smith v. Goguen*, 415 *U.S.* 566, 574, 94 *S. Ct.* 1242, 1248, 39 *L. Ed.* 2d 605, 613 (1974)).

Since the section of this statute dealing with video booths fails to be the least restrictive means which the legislature could utilize to combat the public health problem presented and also because the statute is impermissibly vague, plaintiffs have established a reasonable probability of ultimate success on the merits of this action.

The plaintiffs easily meet the other *Crowe* factors under the facts presented. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 *U.S.* 347, 373-74, 96 *S. Ct.* 2673, 2690, 49 *L. Ed.* 2d 547, 565-566 (1976) (citing *New York Times Co. v. United States*, 403 *U.S.* 713, 91 *S. Ct.* 2140, 29 *L. Ed.* 2d 822 (1971)). This, in turn, results in hardships being visited upon plaintiff should the statute go into effect

which far exceed those which would be suffered by defendants should an injunction issue.

Plaintiffs have demonstrated that they meet the *Crowe* factors for a preliminary injunction to issue as to the portion of the statute dealing with video booths. These same factors are met as to the amendments to *N.J.S.A.* 2C:33-12.1 as those amendments prescribe penalties for the violations of the video booth section of the statute. As to those two portions of the legislation, a preliminary injunction enjoining enforcement shall and hereby does issue. As to that portion of the enactment which reserves to municipalities the right to regulate the hours of sexually oriented businesses, the matter is not yet ripe for consideration and plaintiff's request for a preliminary injunction blocking enforcement of that portion of the statute is denied.

Appendix D

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MERCER COUNTY

Docket No.

Civil Action

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

CHEZ SEZ VIII, INC., t/a United Video, DAVID PORTEN, t/a Adult Entertainment Center, HAMILTON AMUSEMENT CENTER, INC., t/a Video Express, L.O.J., INC., t/a The Emporium, and VITO J. FRUGGIERO, INC., t/a Red Barn Books,

Plaintiffs,

vs.

DEBORAH T. PORITZ, ATTORNEY GENERAL FOR THE STATE OF NEW JERSEY and THE STATE OF NEW JERSEY,

Defendants.

Plaintiffs, on their own behalf and on behalf of their customers, by and through their attorneys, for their complaint against the defendants above-named, allege upon information and belief, as follows:

INTRODUCTION

1. Plaintiffs commence this action for declaratory and injunctive relief to restrain and enjoin defendants, their agents and employees, from enforcing recent amendments to New Jersey Statutes 2C:33-12.1 and the addition of new Section 2C:33-12.2 which prohibit "sexually oriented businesses" from offering private viewing booths for the viewing of films and videotapes and which grants municipalities the power to enact restrictions on their hours of operation in violation of plaintiffs' rights guaranteed by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 6 of the New Jersey Constitution (the statutory amendments are annexed as Exhibit A).

JURISDICTION

2. This action is commenced pursuant to the authority of Title 42, United States Code, Section 1983 and New Jersey Statutes 2A:16-52 and 2A:16-53, as the amendments violate plaintiffs' rights to freedom of speech guaranteed by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 6 of the New Jersey Constitution and plaintiffs' right to equal protection of law guaranteed by the Fourteenth Amendment to the United States Constitution.

PARTIES

3. Plaintiff CHEZ SEZ VIII, INC., t/a United Video, is a duly organized corporation of the State of New Jersey operating an establishment, at 25 Whitehorse Pike, Egg Harbor City, NJ 08215.

4. Plaintiff CHEZ SEZ VIII, INC., t/a United Video, is a retail bookstore and video store which offers for sale, *inter alia*, a variety of adult films, videotapes, and magazines and

which also offers 15 private viewing booths for the screening of such materials.

5. Plaintiff DAVID D. PORTEN, t/a Adult Entertainment Center, is a duly organized corporation of the State of New Jersey operating an establishment at Wrightstown Shopping Center, Wrightstown, NJ 08562.

6. Plaintiff DAVID D. PORTEN, t/a Adult Entertainment Center, is a retail bookstore and video store which offers for sale, *inter alia*, a variety of adult videotapes and magazines and which also offers 15 private viewing booths for the screening of such materials.

7. Plaintiff HAMILTON AMUSEMENT CENTER, INC., t/a Video Express, is a duly organized corporation of the State of New Jersey operating an establishment at 1030 Route 33, Hamilton Township, NJ 08690.

8. Plaintiff HAMILTON AMUSEMENT CENTER, INC., t/a Video Express, is a retail bookstore and video store which offers for sale, *inter alia*, a variety of adult films, videotapes, and magazines and which also offers 20 private viewing booths for the screening of such materials.

9. Plaintiff L.O.J., INC., t/a The Emporium, is a duly organized corporation of the State of New Jersey operating an establishment at 245 Route 130/206, Bordentown, NJ 08505.

10. Plaintiff L.O.J., INC., t/a The Emporium, is a retail bookstore and video store which offers for sale, *inter alia*, a variety of adult films, videotapes, and magazines and which also offers 24 private viewing booths for the screening of such materials.

11. Plaintiff VITO J. FRUGGIERO, INC., t/a Red Barn Books, is a duly organized corporation of the State of New Jersey operating establishments at 310 Route 73 Berlin, NJ 08009, Vantage Plaza, Crookstown/Wrightstown Road, Wrightstown, New Jersey, 1204 White Horse Pike, Egg Harbor City, New Jersey 08215, and 600 Route 130 South, Gloucester Heights, New Jersey 08030.

12. Plaintiff VITO J. FRUGGIERO, INC., t/a Red Barn Books, operates retail bookstores and video stores which offer for sale, *inter alia*, a variety of adult films, videotapes, and magazines and which also offer 68 private viewing booths for the screening of such materials.

13. Defendant, Deborah T. Poritz, is the Attorney General for the State of New Jersey, and, as such, is responsible for the enforcement of the laws of the State of New Jersey.

14. Defendant State of New Jersey is the entity which enacted the statute challenged by this action.

15. At all times relevant hereto, defendants have acted under color of statute, regulation, custom or usage of the State of New Jersey.

ALLEGATIONS

16. On or about July 6, 1995 the State of New Jersey enacted amendments to New Jersey Statutes 2C 33-12.1 entitled "Abating a Nuisance" and supplementing Chapter 33 of Title 2C of the New Jersey Statutes by adding 2C 33-12.2. These amendments and additions provide that a person is guilty of maintaining a nuisance when:

> The person owns or operates a sexually oriented business which offers for public use booths, screens, enclosures or other devices which facilitate sexual activity by patrons. (2C:33-12.2b[1]).

17. The statute fails to define what is covered by the terms "booths, screens, enclosures or other devices".

18. The statute further fails to notify persons as to whether all "booths, screens, enclosures and other devices" are subject to the law or only those which "facilitate sexual activity by patrons".

19. A "sexually oriented business" is defined in 2C:33-12.2a(l) as:

(a) A commercial establishment which as one of its principal business purposes offers for sale, rental or display any of the following: books, magazines periodicals or other printed material, or photographs, films, motion pictures, video cassettes, slides or other visual representations which depict or describe a "specified sexual activity" or "specified anatomical area"; or still or motion picture machines, projectors or other image-producing devices which show images to one person per machine at any one time, and where the images so displayed are characterized by the depiction of a "specific sexual activity" or specified anatomical area"; or instruments, devices, or paraphernalia which are designed for use in connection with a "specified sexual activity"; or

(b) A commercial establishment which regularly features live performances characterized by the exposure of a "specified anatomical area" or by a "specified sexual activity" or which regularly shows films, motion pictures, video cassettes, slides or other photographic representations which depict or describe a "specified sexual activity" or "specified anatomical area". 2C:33-12.2a(l)(a) and (b).

20. "Specified anatomical area" is defined as "less than complete and opaquely covered human genitals, pubic region, buttock or female breasts below a point immediately above the top of the areola; or human male genital is a discernibly turgid state, even if covered". 2C:33-12.2a(3)(a) and (b).

21. "Specified sexual activity" is defined as "[t]he fondling or other erotic touching of covered or uncovered human genitals, pubic region, buttock or female breast; or any actual or simulated act of human masturbation, sexual intercourse or deviate sexual intercourse". 2C:33-12.2a(4)(a) and (b).

22. A person who violates this statute is guilty of a crime of the fourth degree. In addition, the statute permits the Court to order the immediate abatement of the nuisance for a period of up to one year and permits the Court to order the seizure and forfeiture or destruction of any chattels or other personal property which may be found in such building or place which were possessed or used with a purpose of maintaining the nuisance.

23. Further, the statute provides that municipalities shall have the power to determine restrictions on hours of operation of a sexually-oriented business. (2C:33-12.2c).

Ban on Private Viewing Booths

24. At all times relevant hereto, plaintiffs offered on their premises individual, enclosed viewing booths designed for the delivery of expressive materials to patrons.

25. By virtue of this statute, the viewing of constitutionally protected films or videos in individual enclosures is completely banned and the viewing public is denied access to the market of works available for video booth screening on premises.

26. This prohibition on the viewing of protected speech is violative of plaintiffs' constitutional rights guaranteed by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 6 of the New Jersey Constitution and the corresponding constitutional rights of their patrons.

27. Specifically, the statute's bar to viewing in individual enclosures is an unconstitutional content-based restriction on permitted speech which fails to promote a compelling state interest and does not employ the least restrictive means to further any such interest.

28. Neither is the viewing booth ban narrowly tailored to further a substantial governmental interest and any governmental interest allegedly advanced is not factually supported.

29. Moreover, the statute fails to provide alternative avenues of communication as it wholly bans a recognized forum of expression.

30. Consequently, the statute impermissibly restrains constitutionally protected speech and destroys an entire mode of on premises communication.

Hours of Operation Restrictions

31. At all times relevant hereto, plaintiff CHEZ SEZ VIII, INC., t/a United Video was and is open to the public 24 hours per day, 7 days a week.

32. At all times relevant hereto, plaintiff DAVID D. PORTEN, t/a Adult Entertainment Center was and is open to the public between the hours of 10:00 a.m. and midnight 7 days a week.

33. At all times relevant hereto, plaintiff HAMILTON AMUSEMENT CENTER, INC., t/a Video Express was and is open to the public during the hours of 9:00 a.m. to midnight Monday through Thursday, 9:00 a.m. to 2:00 p.m. Friday and Saturday and 10:00 a.m. to midnight on Sunday.

34. At all times relevant hereto, plaintiff L.O.J., INC., t/a The Emporium was and is open to the public 24 hours per day 7 days a week.

35. At all times relevant hereto, plaintiff VITO J. FRUGGIERO, INC., t/a Red Barn Books operates, and operated establishments in Berlin, New Jersey, Egg Harbor City, New Jersey and Gloucester Heights, New Jersey which are open to the public 24 hours per day, 7 days per week and in Crookstown, New Jersey which is open to the public 24 hours per day, Fridays and Saturdays, and from 8:00 a.m. to midnight Sunday through Thursday.

36. The statutory amendments at issue permit local municipalities to enact restrictions on the hours of operation of businesses falling within the statute's definition of "sexually oriented businesses". As previously detailed, the definition of

a "sexually oriented business" is specifically dependent on the content of the materials purveyed.

37. Consequently, the statute is a content-based restriction on speech that does not promote a compelling state interest or employ the least restrictive means to further any such interest.

38. Neither is the hours of operation provision narrowly tailored to further a substantial governmental interest and any interest allegedly advanced is not factually supported.

39. Further, because the statute permits the unrestricted closure of various establishments, it fails to provide alternative avenues of communication.

40. Application of this statute will result in the improper restraint of the dissemination of constitutionally protected works.

FIRST COUNT

41. Plaintiffs incorporate by references paragraphs "1" through "40" of this complaint as if herein set forth at length.

42. New Jersey Statutes 2C:33-12.2 bans the communication of constitutionally-protected messages via individual, enclosed viewing booths in violation of plaintiffs' rights guaranteed by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 6 of the New Jersey Constitution.

SECOND COUNT

43. Plaintiffs incorporate by references paragraphs "1" through "42" of this complaint as if herein set forth at length.

44. New Jersey Statutes 2C:33-12.2 improperly grants municipalities the power to impose hours of operation restrictions on plaintiffs' business in violation of plaintiffs' rights guaranteed by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 6 of the New Jersey Constitution.

THIRD COUNT

45. Plaintiff incorporate by references paragraphs "1" through "44" of this complaint as if herein set forth at length.

46. New Jersey Statutes 2C:33-12.1 and 2C:33-12.2 operate as unconstitutional prior restraints in violation of plaintiffs' rights guaranteed by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 6 of the New Jersey Constitution.

FOURTH COUNT

47. Plaintiffs incorporate by references paragraphs "1" through "46" of this complaint as if herein set forth at length.

48. New Jersey Statutes 2C:33-12.1 and 2C:33-12.2 violate plaintiffs' right to equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution by impermissibly treating the speakers of one type of constitutionally-protected speech different from speakers of other types of protected expression.

FIFTH COUNT

49. Plaintiffs incorporate by references paragraphs "1" through "48" of this complaint as if herein set forth at length.

50. New Jersey Statutes 2C:33-12.2 is unconstitutionally vague in that it fails to provide proper notice of the conduct prohibited by the statute and encourages arbitrary and discriminatory enforcement in violation of plaintiffs' rights guaranteed by the Fourteenth Amendment to the United States Constitution as it fails to define the terms "booths, screens, enclosures or other devices" and the term "facilitate sexual activity by patrons" and further fails to specify whether all "booths, screens, enclosures or other devices" are prohibited by the statute or only those found to "facilitate sexual activity by patrons".

SIXTH COUNT

51. Plaintiffs incorporate by references paragraphs "l" through "50" of this complaint as if herein set forth at length.

52. Enforcement of New Jersey Statutes 2C:33-12.1 and 2C:33-12.2 will result in irreparable harm to plaintiffs if not immediately enjoined in that plaintiffs' freedom of speech guaranteed by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 6 of the New Jersey Constitution will be burdened, restricted and suppressed.

WHEREFORE, plaintiffs respectfully demand judgment as follows:

(1) Declaring that New Jersey Statutes 2C:33-12.1 and 2C:33-12.2 violate the United States and New Jersey Constitutions;

(2) Preliminarily and permanently enjoining and restraining defendant from enforcing 2C:33-12.1 and 2C:33-12.2;

(3) Granting plaintiffs the costs and disbursements associated with this action;

(4) Granting plaintiffs reasonable attorneys' fees pursuant to 42 USC §1988; and

(5) Granting such other and further relief as this Court may deem just and proper under the circumstances.

DATED: August ___, 1995

Respectfully submitted,

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(2)

Supreme Court, U.S.
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CLERK

No. 97-319

In the

Supreme Court of the United States

October Term, 1996

CHEZ SEZ, VIII, INC., t/a United Video, et al.,

Petitioners,

v.

DEBORAH T. PORITZ, Attorney General for the State of New Jersey, and THE STATE OF NEW JERSEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

Brief of the Respondents in Opposition to Petition

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27pp

QUESTIONS PRESENTED

1. Whether a New Jersey statute which prohibits sexually oriented businesses from offering for public use booths, screens, or enclosures for viewing videos or movies, that are sufficiently private so as to "facilitate sexual activity," is unconstitutionally vague.

2. Whether the restriction on the design of only those booths or enclosures which are located in sexually oriented businesses, when there is evidence that high-risk sexual conduct leading to the spread of disease takes place in private booths in such businesses, is an unconstitutional content-based regulation of protected speech.

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No. 97-319

In the

Supreme Court of the United States

October Term, 1996

CHEZ SEZ, VII, INC., t/a United Video, DAVID PORTEN, t/a Adult Entertainment Center, HAMILTON AMUSEMENT CENTER, INC., t/a Video Express, L.O.J., INC., t/a The Emporium, and VITO J. FRUGGIERO, INC., t/a Red Barn Books,

Petitioners,

v.

DEBORAH T. PORITZ, Attorney General for the State of New Jersey, and THE STATE OF NEW JERSEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

Brief of the Respondents in Opposition to Petition

STATEMENT OF THE CASE

The New Jersey statute at issue here provides that a person is guilty of a crime of the fourth degree if he or she "owns or operates a sexually oriented business which offers for public use booths, screens, enclosures or other devices which facilitate sexual activity by patrons." The Legislature prohibited booths that facilitate sexual activity in order to halt high-risk sexual conduct that leads to the spread of Acquired Immune Deficiency Syndrome ("AIDS") and other diseases.

Petitioners, owners and operators of sexually oriented businesses, challenged this statute in State court on freedom of speech grounds. The trial court erroneously struck down the act and enjoined enforcement but the New Jersey Superior Court, Appellate Division, correctly reversed.

The Appellate Division properly held that the statute fully accords with the United States and New Jersey Constitutions. The Appellate Division recognized that the statute regulates sexual activity in order to address a public health problem and does not restrict materials viewed in booths. The Appellate Division further ruled that the statute is not vague, noting that owners and operators of sexually oriented businesses should know that patrons would be more likely to engage in sexual relations in private booths, which are prohibited, rather than in open cubicles, which are permitted. Accordingly, the Appellate Division correctly applied the facts to well-settled law and declared the statute constitutional. Because this case does not raise issues that warrant Supreme Court review, the petition for a writ of certiorari to the New Jersey Supreme Court should be denied.

As noted above, the statute which is the subject of this case, 1995 N.J.Laws 167 (codified at N.J.Stat.Ann. § 2C:33-12.2 (West 1997)), prohibits owners or operators of sexually oriented businesses from offering for public use booths, screens, or enclosures for viewing videos or movies, in which patrons are known to engage in sexual activity, including high-risk, unprotected sex with anonymous partners. Specifically, N.J.Stat.Ann. § 2C:33-12.2 provides that a person is guilty of a crime of the fourth degree if he or she "owns or operates a sexually oriented business which offers for public use booths, screens, enclosures or other devices which facilitate sexual activity by patrons."[1] An

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[1] The statute defines a "sexually oriented business" as a "commercial establishment which as one of its principal business purposes

accompanying amendment to N.J.Stat.Ann. § 2C:33-12.1 authorizes a court to order the immediate abatement of the nuisance created by one found guilty of violating N.J.Stat.Ann. § 2C:33-12.2, may order the building which is the subject of a violation to be closed for up to one year, and may order forfeiture of personal property possessed or used with a purpose of maintaining the nuisance. N.J.Stat.Ann. § 2C:33-12.1a (West 1997).

The legislative history of N.J.Stat.Ann. § 2C:33-12.2 is extensive and illuminating. The Senate Judiciary Committee reviewed a memorandum by a member of the Office of Legislative Services and Committee aide, as well as a lengthy statement with exhibits prepared by the President of the Atlantic County American Family Association of New Jersey. The memorandum provides:

> Many adult book stores display sexually oriented movies and live sex acts to patrons in private booths or similar enclosures. These private booths often encourage anonymous sexual acts by patrons. As this type of conduct is conducive to the spread of sexually transmitted diseases, [the bill] would provide that any person who owns or operates a sexually oriented business which offers for public use private booths or other similar enclosures is guilty of maintaining a nuisance.

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offers for sale, rental or display . . . books, magazines, periodicals or other printed material, or photographs, films, motion pictures, video cassettes, slides or other visual representations which depict or describe a 'specified sexual activity' or 'specified anatomical area' . . .." N.J.Stat.Ann. § 2C:33-12.2(1)(a).

The memorandum further notes that the Third Circuit, in *Mitchell v. Commission on Adult Entertainment Establishments*, 802 F.Supp. 1112 (D. Del. 1992), *aff'd*, 10 F.3d 123 (3d Cir. 1993), had recently upheld the constitutionality of a Delaware statute "with provisions similar to those proposed in [the bill]."

The statement before the Committee describes booths in adult entertainment establishments where persons have unprotected sex with anonymous partners in the same booth or in an adjoining booth through so-called "glory holes" in the side wall. Attached to this statement was a copy of the Delaware statute upheld in *Mitchell* as well as excerpts from numerous newspaper articles and court opinions concerning the use by patrons of private video booths in adult entertainment establishments for unprotected sexual activity. A press release from the Pennsylvania Attorney General concerning two adult book stores where male customers had engaged in illicit sexual activity through holes in the video booth partitions was also attached. The attachments reported that some patrons masturbate in the booths, that semen and blood are frequently found on the walls, and that defecation and urine are found on the floors. The articles stated that male prostitutes would engage in homosexual activity in the booths. Another article concluded that "some peep-show patrons would be more likely to engage in sexual activities with one another behind closed doors than in open cubicles."

The Delaware statute at issue in *Mitchell* provides that, to reduce the transmission of communicable diseases such as AIDS, commercial buildings may not have partitions with apertures that "facilitate sexual activity between persons on either side of the partition." Del.Code Ann. tit. 24 § 1633(b)(1) (1996). Booths, stalls, or rooms in which movies are viewed may not have doors, curtains or portal partitions, unless at least one side is open to an adjacent public room and the area inside is visible to persons in that adjacent public room. Del.Code Ann. tit. 24 § 1633(b)(2). The Sponsor

Statement accompanying the Delaware statute reflects the legislative purpose:

> This Act provides that no adult entertainment establishment shall be so constructed as to facilitate high-risk sexual conduct. This includes rooms or partitions between the rooms which might be so constructed as to facilitate anonymous sex; and includes booths or partitioned rooms specifically equipped for "motion pictures or other forms of entertainment."

Thereafter, the New Jersey Senate Committee reported the bill to the full Senate without amendment. The Committee Statement accompanying the bill provided that "private booths or similar enclosures . . . often encourage anonymous sexual acts by patrons." The bill passed the New Jersey Senate unanimously.

When the Assembly Judiciary, Law and Public Safety Committee considered the bill, a Senior Deputy Attorney General appeared and stated the Attorney General's position that a ban on booths that facilitate sexual activity would improve sanitation at adult entertainment establishments and retard the spread of sexually-transmitted diseases. The Senior Deputy Attorney General also apprised the Committee of the treatment of the Delaware statute by the Third Circuit in *Mitchell* and read parts of the Third Circuit opinion to the Committee.

A statement in support of the bill was submitted to the Assembly Committee by the State Director of Concerned Women for America. This statement provided in relevant part that regulating sexually oriented businesses

which "encourage anonymous, disease-spreading sexual activity" furthers a compelling State interest.

The Assembly Committee reported the bill to the full Assembly with one technical amendment. The Committee Statement accompanying the bill provided that "private booths or similar enclosures . . . often encourage anonymous sexual acts by patrons." The Assembly unanimously passed the amended bill. Governor Whitman then signed the bill on July 5, 1995, and the law was to become effective on September 4, 1995. 1995 N.J.Laws 167.

Prior to the effective date, petitioners, owners and operators of adult entertainment establishments, brought suit in State court seeking to enjoin defendants New Jersey Attorney General and the State of New Jersey from enforcing N.J.Stat.Ann. § 2C:33-12.2 (A32). Plaintiffs alleged that they offer on their premises individual, enclosed booths for patrons to view films or videos (A33-35). Plaintiffs contended that the statute abridges their freedom of speech, denies them equal protection of the laws, and fails to provide proper notice of the prohibited conduct (A39-40).

The trial court issued a preliminary, then permanent, injunction restraining enforcement of the statute (A31). The trial court found that the purpose of the statute -- to deter anonymous, unprotected sexual contact which leads to the spread of sexually-transmitted diseases -- was a compelling governmental interest (A28). The trial court further construed N.J.Stat.Ann. § 2C:33-12.2 to prohibit the operation of a sexually oriented business which contains *any* booths for video viewing, (A28), and struck down the statute as unconstitutional because it did not employ the least restrictive means available to advance the state interest (A28-29).

Moreover, the trial court noted that if it accepted the State's argument that N.J.Stat.Ann. § 2C:33-12.2 is

intended only to regulate certain types of booths and not prohibit all of them, then the statute is unconstitutionally vague (A29). The trial court did not reach plaintiffs' equal protection argument.

The State appealed and the Appellate Division reversed and vacated the stay of enforcement. The Appellate Division noted that the statute does not ban the viewing of sexually explicit materials but, rather, is focused on conduct, prohibiting sexually oriented businesses from providing private booths which facilitate sexual activity by patrons (A8). According to the Appellate Division, the statute is content-neutral because it is aimed at curbing high-risk sexual activity rather than suppressing speech: "On its face the statute is intended to regulate sexual conduct as a health problem, not the materials presented." (A8).

Accordingly, the Appellate Division ruled that because the statute affects activity rather than speech, the Legislature need not use the least restrictive means but, rather, need only "promote[] a substantial government interest that would be achieved less effectively absent the regulation." (A15, quoting *Mitchell*, *supra*, 10 F.3d at 137). The Appellate Division held that the statute did not limit available materials and did not prohibit people from watching films in individual enclosures so it left ample alternative modes for viewing the materials (A18).

In addition, the Appellate Division rejected the trial court's finding that the statute was vague (A21). The Appellate Division noted that the statute

> adequately defines the proscribed conduct and instructs owners of commercial establishments not to facilitate such conduct on their premises by providing booths, enclosures or other devices not open

> to any public area. For example, booths which do not have apertures known as "glory holes" in their walls and are also open to public view would not be violative of the statute. The use and configuration of booths and enclosures, and their appropriate lighting is otherwise left by the Legislature to common sense and the informed discretion of a reasonable person. Through simple supervision owners can monitor and detect the activities of their patrons. [A21].

The Court further explained that "enclosures meeting other jurisdictions' physical requirements would be permissible under the State's statute. For example, if the interior of a booth is visible to a public room it would not be considered conducive to sexual activity any more than other areas of the business that are open to the public and visible to visitors, customers and store personnel." (A17).

Petitioners filed an appeal and a petition for certification to the New Jersey Supreme Court. The appeal was dismissed and the petition denied on May 21, 1997 (A1).

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE STATE COURT CORRECTLY APPLIED WELL-SETTLED LAW AND THE CASE DOES NOT PRESENT ANY "SPECIAL AND IMPORTANT REASONS" WARRANTING REVIEW BY THE SUPREME COURT.

A petition for a writ of certiorari may be granted "only when there are special and important reasons therefor." Sup.Ct.R. 10. "Special and important reasons" are present in cases in which a state court "has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court." Sup.Ct.R. 10(c). Contrary to petitioner's assertions, this case involves the application of well-settled law and, therefore, does not warrant review by this Court.

As the Court has explained, "[c]ertiorari is granted only 'in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.'" *National Labor Relations Board v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951) (quoting *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923)). Indeed,

> [a] federal question raised by a petitioner may be "of substance" in the sense that abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor

> does it sit for the benefit of particular litigants. "Special and important reasons" imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion. [*Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955) (citations omitted)].

Petitioners argue that N.J.Stat.Ann. § 2C:33-12.2 contravenes principles of freedom of speech in the First Amendment to the United States Constitution[2] because the statute does not employ the least restrictive means to achieve the legislative goal (P19). Petitioners further argue that the statute contravenes principles of due process because it is vague (P7). These arguments are without merit. The Appellate Division correctly held that the Legislature intended to regulate *conduct* by foreclosing the use of private booths in which patrons are known to engage in high-risk sexual activity. In addition, the Appellate Division correctly ruled that the type of booth that is proscribed pursuant to the statute, one which "facilitates sexual activity," is not vague

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[2] The First Amendment, which provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press," applies to the states through the Due Process Clause of the Fourteenth Amendment. *Edwards v. South Carolina*, 372 U.S. 229 (1963). Petitioners also challenged the statute as violative of the corollary provision in the New Jersey Constitution, Article I, Paragraph 6, which provides: "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press."

but, rather, has a clear meaning that owners and operators of sexually oriented businesses can readily understand.

Thus, this case involves application of well-settled law to a state statute. It does not present issues that warrant Supreme Court review, nor does it involve questions that have not already been addressed by the Supreme Court. Therefore, the petition for a writ should be denied because it does not concern a "special and important" question within the meaning of Rule 10.

A. The State Court Correctly Ruled That N.J.Stat.Ann. § 2C:33-12.2 Is Not Vague.

Petitioners contend that the statute is vague and, further, that the Appellate Division's discussion of the type of booth that the statute proscribes made the terms of the statute even more vague. These contentions are without merit. The Appellate Division correctly recognized that the terms of the statute are easily understood by the ordinary owner or operator of this type of business.

As the Court has explained:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit

> standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications. [*Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)(footnotes omitted)].

A law is void for vagueness if persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

However, statutory language need not provide "mathematical certainty"; it is enough that the reader can ascertain what the statute as a whole prohibits. *Grayned*, *supra*, 408 U.S. at 110. As the Appellate Division noted, "a common sense approach is appropriate in construing the enactment, in terms of the persons who may be subject to it, and in context with its intended purpose" (A19, citations omitted). There is, thus, no requirement that statutes be drafted in such a manner that every minute detail is provided; rather, legislatures are free to express their intentions in more general terms.

Moreover, if the legality of some booths may be subject to question, nullification of the entire statute does not necessarily follow. "That there may be marginal cases in which it is difficult to define the side of the line on which a particular fact situation falls is not sufficient reason to hold the language too vague to define a criminal offense . . . . [T]he Constitution does not require impossible standards." *United States v. Petrillo*, 332 U.S. 1, 7 (1947).

In this case, the Appellate Division recognized that the Legislature was entitled to take notice of other

jurisdictions' need for regulation of booths in sexually oriented businesses to address dangers to public health, as well as the methods other jurisdictions employed (A15). The court stated that the spread of sexually transmitted disease through high-risk conduct was a compelling problem and the Legislature may address this problem by prohibiting sexually oriented businesses from providing booths which facilitate this activity (A16-17). The court noted that the approach of other jurisdictions is to require the inside of the booth to be visible from the public areas of the business by setting specific physical restrictions on the type of booth permitted (A17). However, New Jersey's statute

> accomplishes the same result. As we construe the Act, enclosures meeting other jurisdictions' physical requirements would be permissible under the State's statute. For example, if the interior of a booth is visible to a public room it would not be considered conducive to sexual activity any more than other areas of the business that are open to the public and visible to visitors, customers and store personnel. Thus, New Jersey's statute embraces all the physical requirements of other jurisdictions, and leaves it to each proprietor to design a viewing area which will not facilitate sexual activity. [A17].

Like Delaware, New Jersey sought to ban booths that "*facilitate sexual activity* by patrons," but used more general terms. According to *Webster's Third International Dictionary* (Merriam-Webster 1976), "facilitate" means "to make easier or less difficult: free from difficulty or impediment." The Appellate Division ruled that the verb

"facilitate" has been found not to be vague by various other jurisdictions (A20).

There may be variations of booth construction that sidestep the explicit prohibitions in the Delaware statute while still affording occupants enough privacy to engage in sexual activity. Perhaps seeking to avoid permitting video booth construction loopholes, New Jersey chose not to provide a construction-oriented definition in its statute but retained the key description of a prohibited booth: one that "facilitates sexual activity."

The Appellate Division concluded:

> New Jersey's statute is not vague. It adequately defines the proscribed conduct and instructs owners of commercial establishments not to facilitate such conduct on their premises by providing booths, enclosures or other devices not open to any public area. For example, booths which do not have apertures known as "glory holes" in their walls and are also open to public view would not be violative of the statute. The use and configuration of booths and enclosures, and their appropriate lighting is otherwise left by the Legislature to common sense and the informed discretion of a reasonable person. Through simple supervision owners can monitor and detect the activities of their patrons. [A21].

Petitioners should be adequately guided by this explanation of the meaning of the statutory prohibition.

Petitioners further contend that the statute does not provide adequate guidance to law enforcement personnel, thereby inviting arbitrary application of the law (P9). It should be apparent to law enforcement officials that an objectionable video booth is one that affords the occupants sufficient privacy, that is shielded from public view, thereby facilitating sexual relations by patrons. Accordingly, an open cubicle would be permitted but a private booth would not.

In sum, N.J.Stat.Ann. § 2C:33-12.2 is not vague. Ordinary owners and operators of sexually oriented businesses can readily ascertain that a booth that is open to public view is permitted and a private booth is not.

B. The State Court Applied the Proper Standard of Review Concerning Void-for-Vagueness Principles.

Petitioners argue that the Appellate Division applied the wrong standard of review with regard to the analysis of void-for-vagueness principles (P14). This contention is without merit. The Appellate Division correctly applied the law to the facts and reached a sound conclusion.

As petitioners point out, the Appellate Division did state that "[s]ince the challenge here to N.J.S.A. 2C:33-12.2 is not as applied, the statute must be reviewed on its face to determine if it is 'impermissibly vague in all its applications.' [*State v. Cameron*, 100 N.J. 586, 593 (1985)] (*quoting Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 495 (1982))." (A19). The court, however, did not dwell further on the distinction between facial and as applied review, nor did it rest any holding on this distinction.

After setting forth the basic principles concerning vagueness challenges, the Appellate Division discussed other cases upholding open booth ordinances against challenge

based on vagueness principles, concluding that the New Jersey statute clearly defines the terms that set sexually oriented businesses apart from other businesses (A20). The court noted that the use of the verb "facilitate" in the statute is not vague (A20). The court then turned to the Seventh Circuit opinion in *Berg v. Health and Hospital Corp.*, 865 F.2d 797 (7th Cir. 1989), which held that the ordinance at issue there is not vague because, even though the language used is general rather than specific, persons of ordinary intelligence could identify which businesses are subject to the ordinance. (A20, quoting *Berg*, *supra*, 865 F.2d at 803).

The Appellate Division then concluded that the New Jersey statute is not vague because "[i]t adequately defines the proscribed conduct and instructs owners of commercial establishments not to facilitate such conduct on their premises by providing booths, enclosures or other devices not open to any public area" (A21). Thus, the court properly applied the law and reached the correct conclusion, that the statute is not vague. Petitioners' contention that the court applied the wrong standards is without merit.

C. The Statute Adequately Defines the Type of Booth That Is Prohibited As One That Is Not Open To Any Public Area.

Petitioners contend that the statute is invalid because it adopts all requirements of other jurisdictions concerning such booths without specifying which requirements are controlling (P15). This contention is factually inaccurate. The Appellate Division held that the statute proscribes booths "not open to any public area." (A21). The court refers to requirements of other jurisdictions as examples: booths that meet the physical requirements of other jurisdictions would generally be permitted under New Jersey's statute. Thus, the court referred to other jurisdictions' requirements simply to further illustrate the

meaning of the statutory prohibition, not to incorporate those provisions into the New Jersey statute.

As noted above, the Appellate Division held that the Legislature is permitted to express its intention to prohibit private booths in more general terms than other jurisdictions had (A17). Thus, booths which "facilitate sexual activity" are prohibited. The ordinary owner or operator of a sexually oriented business should be aware that, while patrons may engage in sexual activity in the private booths, they do not generally engage in sexual activity in the store's more open areas. Accordingly, the court held that each proprietor may design a viewing area which will not facilitate sexual activity and, "[t]hrough simple supervision, owners can monitor and detect the activities of their patrons" (A17; A21). This conclusion was reasonable and fully supports the court's definition of a prohibited booth as one that is not open to any public area.

D. Denial of the Petition Does Not Express Any View of the Court on the Merits of This Case.

Petitioners contend that denial of its petition for a writ of certiorari will be viewed as approval of the statute (P16). This contention is misplaced. Denial of the writ carries no such message.

"[A]n order denying a petition for certiorari expresses no opinion on the merits of the case." *Carpenter v. Gomez*, __ U.S. __, __, 116 S.Ct. 488, 488 (1995) (Mem. of Stevens, J., Respecting the Denial of Certiorari). Denial of a petition "simply means that fewer than four members of the Court deemed it desirable to review a decision of the lower court as a matter of sound judicial discretion." *State of Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 917 (1950) (internal quotation omitted). Indeed, "this Court has rigorously insisted that such a denial carries with it no

implication whatever regarding the Court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated." *Id.* at 919.

Accordingly, denial of the petition is not properly viewed as expressing any opinion on the merits of this case. Rather, it simply reflects the Court's exercise of discretion concerning its docket. Therefore, petitioners' contention that such action would send a message is without merit.

E. The State Court Properly Held That N.J.Stat.Ann. § 2C:33-12.2 Is a Content-Neutral Restriction of Activity and Does Not Unlawfully Suppress Speech.

Petitioners argue that N.J.Stat.Ann. § 2C:33-12.2 is an unconstitutional restriction of protected speech. Specifically, petitioners contend that N.J.Stat.Ann. § 2C:33-12.2 does not employ the least restrictive means available to advance the state interest of halting high-risk sexual activity (P19). In addition, petitioners contend that the Legislature intended to ban *all* viewing booths, whether they be private or open (P20). However, petitioners' proposed standard of review is inapplicable and its view of the legislative history is erroneous.

The Appellate Division correctly noted that the statute does not ban the viewing of sexually explicit materials but, rather, prohibits sexually oriented businesses from providing booths which facilitate sexual activity by patrons (A8). According to the Appellate Division, the statute is not aimed at suppression of speech or expression: "On its face the statute is intended to regulate sexual conduct as a health problem, not the materials presented [in booths]." (A8).

The Appellate Division further ruled that because the statute affects activity rather than speech, the Legislature

need not pursue the least restrictive means but, rather, need only "promote[] a substantial government interest that would be achieved less effectively absent the regulation." (A15, *quoting Mitchell, supra*, 10 F.3d at 137). Thus, petitioners' reliance on *Times Square Books, Inc. v. City of Rochester*, 645 N.Y.S.2d 951 (App. Div. 1996), is misplaced. In *Times Square Books*, plaintiffs offered to remove the bottom two feet of the doors to permit enforcement of an ordinance requiring only one person per booth; the court found this offer satisfactory because there was a "paucity of factual support for the City's action . . . ." *Id.* at 956-57. In contrast, the factual support for the New Jersey statute is extensive.

In addition, the New Jersey Appellate Division analyzed the statute as a content-neutral time, place, and manner regulation because its purpose was not to suppress speech but, rather, to address another problem (A14); *see City of Renton v. Playtime Theaters*, 475 U.S. 41, 47 (1986); *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 63 (1976). A content-neutral time, place, and manner regulation is constitutional as long as it is "designed to serve a substantial governmental interest and do[es] not unreasonably limit alternative avenues of communication." *City of Renton, supra*, 475 U.S. at 48.

Stemming the spread of AIDS clearly is a substantial governmental interest. In addition, as the Appellate Division held, the statute does not limit the available materials and does not prohibit people from watching videos in individual enclosures (A18). Accordingly, the statute allows ample alternative modes for viewing the materials (A18).

Lastly, petitioners' arguments that the legislative history of N.J.Stat.Ann. § 2C:33-12.2 reflects the intent to ban all video booths in sexually oriented businesses, rather than only those private booths that facilitate sexual activity by

patrons, is without merit. The Senate and Assembly Committees both released Statements containing identical language that clearly indicated that the bills targeted a type of booth -- one that is private. Because the bills were passed by the Legislature essentially unchanged, the Committee Statements are reliable indicators of the legislative intent.

In sum, N.J.Stat.Ann. § 2C:33-12.2 fully accords with the United States Constitution and this case does not present any "special and important reason" warranting review by the Supreme Court. Therefore, the petition for a writ of certiorari to the New Jersey Supreme Court should be denied.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari to the New Jersey Supreme Court should be denied.

Respectfully submitted,

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No. 97-319

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CHEZ SEZ VIII, INC., t/a United Video, DAVID PORTEN, t/a Adult Entertainment Center, HAMILTON AMUSEMENT CENTER, INC., t/a Video Express, L.O.J., INC., t/a The Emporium, and VITO J. FRUGGIERO, INC., t/a Red Barn Books,

Petitioners,

vs.

DEBORAH T. PORITZ, Attorney General for the State of New Jersey, and THE STATE OF NEW JERSEY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF PARENT COMPANIES AND SUBSIDIARIES

Petitioners have no parent or subsidiary companies to be listed pursuant to Rule 29.6 of this Court.

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No. 97-319

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CHEZ SEZ VIII, INC., t/a United Video, DAVID PORTEN, t/a Adult Entertainment Center, HAMILTON AMUSEMENT CENTER, INC., t/a Video Express, L.O.J., INC., t/a The Emporium, and VITO J. FRUGGIERO, INC., t/a Red Barn Books,

Petitioners,

vs.

DEBORAH T. PORITZ, Attorney General for the State of New Jersey, and THE STATE OF NEW JERSEY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

POINT I

THE SUBJECT NEW JERSEY CRIMINAL STATUTE IS UNCONSTITUTIONALLY VAGUE ON ITS FACE AND AS CONSTRUED BY THE STATE APPELLATE COURT

Petitioners, owners and operators of adult theme retail book stores and video stores in New Jersey, have attacked the

subject statute[1] as being fatally vague. *Inter alia*, said Act criminalizes activity consisting of operating a sexually oriented business offering the use of booths "which facilitate sexual activity by patrons." However, the statute gives absolutely no guidance as to what kinds of video viewing booths may be found to so facilitate sexual activity.

The New Jersey Superior Court (trial court) agreed with petitioner that §2C:33-12.2(b) is unconstitutionally vague (A-29), and enjoined enforcement thereof (A-31). However, the Appellate Division of the Superior Court [hereinafter "Appellate Division"] reversed, construing the statute in a manner which it deemed to be constitutional (A-16). The New Jersey Supreme Court declined to hear a further appeal by petitioners (A-1).

Respondents, the State of New Jersey and its Attorney General, initially attempt to escape their Act's lack of standards by referring to its legislative history (Respondents' Brief,[2] pp.3-6), and its asserted goal of curbing high-risk sexual conduct leading to the spread of disease (Resp. Brief, p.1). Nevertheless, this Court has only recently reiterated that a statute's laudable purpose does not insulate it from judicial scrutiny under the First Amendment. *Reno v. American Civil Liberties Union*, __ U.S. __, 117 S.Ct. 2329, 2349 (1997) [holding that portions of a federal statute intended to protect children from pornography violated the First Amendment]. Thus, respondents' raising of the spectre of AIDS is not sufficient to overcome a violation of the First Amendment.

Next, respondents assert that the language of a statute need not be specified with "mathematical certainty" (Resp. Brief, p.12). Accordingly, following the Appellate Division, respondents urge a "common sense" approach, trusting "the informed discretion of a reasonable person" (Resp. Brief, p.14; A-21). More, respondents purport to rely on this Court's

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[1] New Jersey Statutes Annotated ["N.J.S.A."] §2C:33-12.2(b).

[2] Hereinafter "Resp. Brief."

opinion in *Grayned v. City of Rockford*, 408 U.S. 104 (1972) [Resp. Brief, pp.11-12].

In their reliance, respondents have seriously misconstrued the import of *Grayned*. In that seminal decision, this Court declared:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' ... than if the boundaries of the forbidden areas were clearly marked." (408 U.S. at 108-09; footnotes omitted)

Accord, *Schenck v. Pro-Choice Network of Western New York*, __ U.S. __, 117 S.Ct. 855, 869-70 (1997) [Following *Grayned*; persons of "ordinary intelligence" must be given "a reasonable opportunity to know what is prohibited"].[3]

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[3] In a criminal statute such as the present, First Amendment concerns are heightened due to the "increased deterrent effect," and the "'risk of

(Footnote continued)

Here, that requirement has not been met. Rather than setting forth prohibited conduct which proprietors of regulated establishments must avoid, the subject statute simplistically proscribes booths or other devices "which facilitate sexual activity by patrons."

The Appellate Division apparently recognized the infirmity inherent in such amorphous language. It conceded that unlike the analogous statutes enacted by other jurisdictions, New Jersey's subject provision does "not [specify] physical requirements." (A-17) Instead, as construed by that court, the Act was found to encompass the physical requirements of other jurisdictions. That is, viewing booths satisfying the enclosure laws of other unspecified states and municipalities would be lawful in New Jersey as well (A-17).

Respondents adopt this analysis as their own. They argue that §2C:33-12.2(b) accomplishes the same result as other jurisdictions seeking to bar viewing booths which facilitate sexual activity by patrons -- particularly Delaware (Resp. Brief, p.13). However, that argument fails.

Statutes in other jurisdictions regulating video viewing booths generally specify exactly what is required and/or prohibited. For example, respondents refer to *Mitchell v. Commission on Adult Entertainment*, 10 F.3d 123 (3d Cir. 1993), upholding the constitutionality of Delaware's regulations for viewing booths (Resp. Brief, pp.4-5). However, as conceded by respondents (Resp. Brief, p.4), title 24 of the Delaware Code Annot., as relevant, proscribes:

> Booths ... used for the viewing of motion pictures or other forms of entertainment, having doors, curtains or portal partitions, unless such *booths ... shall have at least one side open to an adjacent public room* so that the area inside is visible to persons in adjacent public rooms. [§1633(b)(2); emphasis added]

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discriminatory enforcement of vague regulations.'" *Reno v. American Civil Liberties Union*, __ U.S. __, 117 S.Ct. 2329, 2345 (1997).

Thus Delaware, unlike New Jersey, expressly mandates what kind of booths are unlawful. Moreover, in comparing their respective statutes, even respondents concede that relative to Delaware, New Jersey "used more general terms" (Resp. Brief, p.13).

To the same effect is *Berg v. Health & Hospitals Corp.*, 865 F.2d 797 (7th Cir. 1989), relied upon by the Appellate Division (A-20) and respondents (Resp. Brief, p.16). There, the ordinance in question expressly required that the interior of viewing booths be visible from an adjacent public room (865 F.2d at 800).

In fact, the specific requirements of analogous zoning ordinances substantially vary among jurisdictions. Thus, some regulations mandate removal of booth doors, *Time Square Books, Inc. v. City of Rochester*, 223 A.D.2d 270, 645 N.Y.S.2d 951 (4th Dept. 1996); *Bamon Corp. v. City of Dayton*, 923 F.2d 470 (6th Cir. 1991), some regulations require the interior of booths to be visible from an adjacent public room, *Mitchell v. Commission on Adult Entertainment*, 10 F.3d 123 (3d Cir. 1993); *Doe v. City of Minneapolis*, 898 F.2d 612 (8th Cir. 1990), some regulations demand interior visibility from a main aisle, *Wall Distributors, Inc. v. City of Newport News*, 782 F.2d 1165 (4th Cir. 1986); *Postscript Enterprises v. City of Bridgeton*, 905 F.2d 223 (8th Cir. 1990), while others mandate booth visibility from "common areas," *Grunberg v. Town of East Hartford*, 736 F.Supp. 430 (D.Conn. 1989), *affd*, 901 F.2d 297 (2d Cir. 1990).

Contrariwise, the subject provision has no specific requirements. Instead, the Appellate Division declared:

> New Jersey's statute embraces all the physical requirements of other jurisdictions, and *leaves it to each proprietor to design a viewing area* which will not facilitate sexual activity. (A-17; emphasis added)

Respondents embrace the same rationale (Resp. Brief, p.13).

Here, by its own terms, the subject statute contains no express guidance. As construed by the Appellate Division, it includes a veritable grab bag of configurations for the operator of protected[4] adult video stores to choose from -- at his peril. Even worse, the police have seemingly unfettered discretion to decide which jurisdiction's requirements should have been followed, in the event that censorship of free expression is sought.

Petitioners submit that this call to each business to design its own booths, and each law enforcement officer to employ his own discretion (Resp. Brief, pp.14-15), cannot conceivably comport with this Court's command in *Grayned*, *supra*, that: "[L]aws must provide explicit standards for those who apply them" (408 U.S. at 108). As ringingly summed up by the trial court in this very case:

> If the legislature is of the view that an open side to the video booths prevent them from facilitating sexual activity, as many other jurisdictions do, it should say so. Operators of premises which have video booths would then be able to conduct themselves in accordance with the statute. As it currently stands, one must speculate as to whether or not his conduct is proscribed. That is constitutionally impermissible. (A-30)

Respondents agree that pursuant to Rule 10(c), a writ of certiorari may be granted where a state court "has decided a federal question in a way that conflicts with applicable decisions of this Court" (Resp. Brief, p.9). Here, the decision of the Appellate Division flies in the face of *Grayned* and its progeny, and should be reversed.

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[4] Non-obscene sexual expression is protected by the First Amendment. *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989).

POINT II

THE SUBJECT NEW JERSEY CRIMINAL STATUTE IS CONTENT-BASED, AND SHOULD HAVE BEEN SUBJECT TO STRICT SCRUTINY ANALYSIS

The instant statute, by its very terms, applies only to one who "owns or operates a sexually oriented business ..." (N.J.S.A. §2C:33-12.2(b)). Thus, it is not content-neutral. A statute which was actually neutral on this issue would apply to any business containing video viewing booths which somehow facilitates sexual activity by patrons. As pointed out by the trial court herein, a facility showing only "Rebecca of Sunnybrook Farm" in enclosed video booths would not be subject to the statute (A-27). On the other hand, facilities showing the adult film classic "Debbie Does Dallas" in enclosed booths could be prosecuted, based on the content of said movie.

Respondents attempt to counter this point by arguing that the New Jersey statute does not ban viewing adult material; rather, it merely "prohibits sexually oriented businesses from providing booths which facilitate sexual activity by patrons" (Resp. Brief, p.18). But that is exactly the problem. Businesses that do not regularly sell goods or services of an adult nature are free to otherwise facilitate sexual activities by their patrons and not run afoul of the statute.

Respondents further contend that the statute is content-neutral since it is not aimed at suppressing speech (Resp. Brief, p.18). However, such a simplistic approach has been rejected. In *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994), this Court ruled that a governmental assertion of a content-neutral purpose cannot save a statute which clearly discriminates based upon content.

In this regard, it is noteworthy that in *Mitchell v. Commission on Adult Entertainment*, 10 F.3d 123 (3d Cir. 1993), relied upon by both respondents and the Appellate Division, the open booth statute in question applied to "any commercial building, structure, premises or portions thereof" (10 F.3d at

139), not just to sexually oriented businesses. *Accord, Berg v. Health & Hosp. Corp.*, 865 F.2d 797, 806 (7th Cir. 1989) [Booth ordinance applicable to all commercial premises].

Here, the Appellate Division expressly analyzed the statute under the lesser content-neutral "time, place and manner" standard wherein the test is "whether a substantial government interest would be 'achieved less effectively absent the regulation' (citations omitted)" (A-16). That test was found satisfied. It is beyond question, however, that if this Court should find the subject statute to be content-based, it would instead be subject to "the most exacting scrutiny." *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994). Under the circumstances, such scrutiny would be fatal.

CONCLUSION

A state statute wherein criminal penalties for violation is dependent upon the "informed discretion" of a potential violator, and the officer enforcing the statute, should not be allowed to stand.

For the foregoing reasons, and as previously set forth, petitioners request that the Court grant their Petition for Writ of Certiorari.

Respectfully submitted,

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